MONTANA LEGISLATIVE HISTORY

Chapter 497 19 97

Bill H _____ S 97 Original bill & history 1 C

H. Committee on Natural Resources		S. Committee on Natural Resources	
Hearing Date(s) 3/5	1 C	Hearing Date(s) 4/7	1 C
3/21	1 C	4/17	1 C
_____	___ C	_____	___ C
_____	___ C	_____	___ C
Date Out _____	___ C		

Did this bill originate in an interim committee? ___ Yes ___ No

Committee _____ Report _____

	RETURNED TO SENATE WITH AMENDMENTS		
4/08	2ND READING AMENDMENTS CONCURRED	50	0
4/09	3RD READING CONCURRED AS AMENDED	50	0
4/14	SIGNED BY PRESIDENT		
4/15	SIGNED BY SPEAKER		
4/15	TRANSMITTED TO GOVERNOR		
4/25	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 389		
	EFFECTIVE DATE: 04/25/97		

SB 96 INTRODUCED BY GROSFIELD *LC0263 DRAFTER: MCCLURE*

AUTHORIZE THE DEPARTMENT OF JUSTICE TO OPERATE AND MAINTAIN AN AUTOMATED ACCOUNTING AND REPORTING SYSTEM FOR VIDEO GAMBLING MACHINES

BY REQUEST OF DEPARTMENT OF JUSTICE

12/31	INTRODUCED		
1/03	REFERRED TO JUDICIARY		
1/06	FISCAL NOTE REQUESTED		
1/06	FIRST READING		
1/16	FISCAL NOTE RECEIVED		
1/17	FISCAL NOTE PRINTED		
1/24	HEARING		
2/03	TABLED IN COMMITTEE		
2/24	MOTION FAILED TO TAKE FROM COMMITTEE & PLACE ON 2ND READING	18	32
3/03	MISSED DEADLINE FOR 45TH DAY TRANSMITTAL		
	DIED IN COMMITTEE		

SB 97 INTRODUCED BY GROSFIELD *LC0407 DRAFTER: COLHOUN*

REVISE THE WATER LAWS TO CLARIFY THAT THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION MAY ISSUE WATER PERMITS AND CHANGE AUTHORIZATIONS PRIOR TO THE COMPLETION OF AN ADJUDICATION IN A SOURCE OF SUPPLY

BY REQUEST OF DEPARTMENT OF NATURAL RESOURCES & CONSERVATION

12/31	INTRODUCED		
1/03	REFERRED TO NATURAL RESOURCES		
1/06	FIRST READING		
1/17	HEARING		
1/28	COMMITTEE REPORT—BILL PASSED AS AMENDED		
1/31	2ND READING PASSED	46	1
2/01	3RD READING PASSED	45	0
	TRANSMITTED TO HOUSE		
2/03	FIRST READING		
2/03	REFERRED TO NATURAL RESOURCES		
3/05	HEARING		
3/25	COMMITTEE REPORT—BILL CONCURRED AS AMENDED		
4/03	2ND READING CONCURRED	62	38
4/05	3RD READING CONCURRED	57	41
	RETURNED TO SENATE WITH AMENDMENTS		
4/15	2ND READING AMENDMENTS CONCURRED	49	0
4/16	3RD READING CONCURRED AS AMENDED	47	3
4/24	SIGNED BY PRESIDENT		
4/24	SIGNED BY SPEAKER		
4/24	TRANSMITTED TO GOVERNOR		

5/01	SIGNED BY GOVERNOR CHAPTER NUMBER 497 EFFECTIVE DATE: 05/01/97		

SB 98 INTRODUCED BY THOMAS *LC0771 DRAFTER: MCCLURE*

AUTHORIZE THE UNIVERSITY SYSTEM TO ELECT WORKERS' COMPENSATION COVERAGE UNDER PLAN NO. 1, PLAN NO. 2, OR PLAN NO. 3

BY REQUEST OF BOARD OF REGENTS

1/01	INTRODUCED		
1/03	REFERRED TO LABOR & EMPLOYMENT RELATIONS		
1/06	FISCAL NOTE REQUESTED		
1/06	FIRST READING		
1/14	FISCAL NOTE RECEIVED		
1/15	FISCAL NOTE PRINTED		
1/16	HEARING		
2/04	HEARING		
2/06	COMMITTEE REPORT—BILL PASSED AS AMENDED		
2/10	2ND READING DO PASS MOTION FAILED	20	30
2/11	RECONSIDERED PREVIOUS ACTION	30	20
2/17	2ND READING DO PASS AS AMENDED MOTION FAILED	24	26

SB 99 INTRODUCED BY THOMAS *LC0222 DRAFTER: LANE*

REVISE THE LAWS RELATING TO JUVENILE JUSTICE

BY REQUEST OF JUVENILE JUSTICE & JUVENILE MENTAL HEALTH STUDY COMMISSION

1/01	INTRODUCED		
1/03	REFERRED TO JUDICIARY		
1/06	FISCAL NOTE REQUESTED		
1/06	FIRST READING		
1/10	HEARING		
1/17	FISCAL NOTE RECEIVED		
1/20	FISCAL NOTE PRINTED		
1/29	REVISED FISCAL NOTE REQUESTED		
1/30	COMMITTEE REPORT—BILL PASSED AS AMENDED		
2/03	REVISED FISCAL NOTE RECEIVED		
2/08	REVISED FISCAL NOTE PRINTED		
2/13	2ND READING PASSED	48	2
2/14	3RD READING PASSED	47	3
	TRANSMITTED TO HOUSE		
2/15	FIRST READING		
2/15	REFERRED TO CORRECTIONS SELECT COMMITTEE		
2/20	HEARING		
3/06	TABLED IN COMMITTEE		
3/11	COMMITTEE REPORT—BILL CONCURRED AS AMENDED		
3/13	2ND READING CONCURRED AS AMENDED	69	29
3/15	3RD READING CONCURRED	72	25
	RETURNED TO SENATE WITH AMENDMENTS		
3/19	2ND READING AMENDMENTS NOT CONCURRED	50	0
3/20	CONFERENCE COMMITTEE APPOINTED		
4/10	HEARING		
4/10	CONFERENCE COMMITTEE DISSOLVED		
4/10	FREE CONFERENCE COMMITTEE APPOINTED		
4/11	FREE CONFERENCE COMMITTEE REPORT NO. 1		
4/16	2ND READING FREE CONFERENCE COMMITTEE REPORT NO. 1 ADOPTED	40	0

SENATE BILL NO. 97

INTRODUCED BY GROSFIELD

BY REQUEST OF THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING THE WATER LAWS TO CLARIFY THAT THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION MAY ISSUE WATER PERMITS AND CHANGE AUTHORIZATIONS PRIOR TO THE COMPLETION OF AN ADJUDICATION IN A SOURCE OF SUPPLY; CLARIFYING THAT WATER RESERVED UNDER STATE LAW IS NOT SYNONYMOUS WITH FEDERAL AND INDIAN RESERVED WATER RIGHTS UNDER FEDERAL LAW; AMENDING SECTIONS 85-2-101, 85-2-102, 85-2-217, 85-2-228, 85-2-301, 85-2-302, 85-2-311, 85-2-313, 85-2-316, 85-2-321, 85-2-329, 85-2-331, 85-2-336, 85-2-340, 85-2-341, 85-2-342, 85-2-401, AND 85-2-402, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY DATE."

WHEREAS, the Montana Supreme Court, in In the Matter of the Application for Beneficial Water Use Permit Nos. 66459-76L, Ciotti; 64988-g76L, Starner; and Application for Change of Appropriation Water Right No. G15152-s761, Pope, which was decided August 22, 1996, held that an applicant for a permit or change of use authorization on the Flathead Indian Reservation may not as a matter of law meet the applicant's burden of proof to establish that the proposed use will not interfere unreasonably with planned uses or developments for which water has been reserved until the Confederated Salish and Kootenai Tribes' federal reserved water rights are quantified; and

WHEREAS, in 1973, Montana enacted comprehensive legislation referred to as the Montana Water Use Act of 1973, codified in Title 85, chapter 2, to implement Article IX, section 3(4), of the Montana Constitution, which requires that the Legislature provide for the administration, control, and regulation of water rights and establish a system of centralized records of all water rights, and to implement Article IX making the water of the state subject to appropriation for beneficial use by its citizens; and

WHEREAS, Title 85, chapter 2, as amended, provides for the comprehensive adjudication of water rights and the continued development of Montana's water resources through a permit and change authorization process; and

WHEREAS, historically in Montana, water has been developed, water use rights acquired, and changes in water use completed in the absence of the adjudication of water rights in a source of supply;

and

WHEREAS, since July 1, 1973, it has been the intent of the Legislature that provisional permits and change authorizations be issued pursuant to statutory standards in the absence of a completed adjudication in a source of supply; and

WHEREAS, the dissent filed with the Montana Supreme Court decision raises a concern that the majority decision may be interpreted to apply statewide, but that interpretation does not reflect the intent of the Legislature to allow for the continued wise and efficient use of Montana's water resources and Montana's growing economy as required under Title 85, chapter 2.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 85-2-101, MCA, is amended to read:

"**85-2-101. Declaration of policy and purpose.** (1) Pursuant to Article IX of the Montana constitution, the legislature declares that any use of water is a public use and that the waters within the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided in this chapter.

(2) A purpose of this chapter is to implement Article IX, section 3(4), of the Montana constitution, which requires that the legislature provide for the administration, control, and regulation of water rights and establish a system of centralized records of all water rights. The legislature declares that this system of centralized records recognizing and establishing all water rights is essential for the documentation, protection, preservation, and future beneficial use and development of Montana's water for the state and its citizens and for the continued development and completion of the comprehensive state water plan.

(3) It is the policy of this state and a purpose of this chapter to encourage the wise use of the state's water resources by making them available for appropriation consistent with this chapter and to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems. In pursuit of this policy, the state encourages the development of facilities ~~which~~ that store and conserve waters for beneficial use, for the maximization of the use of those waters in Montana, for the stabilization of ~~stream flows~~ streamflows, and for ground water recharge.

(4) Pursuant to Article IX, section 3(1), of the Montana constitution, it is further the policy of this

state and a purpose of this chapter to recognize and confirm all existing rights to the use of any waters for any useful or beneficial purpose.

(5) It is the intent of the legislature that the statutory determinations for issuing new water use permits and authorizing changes do not require the adjudication of all water rights in the source of supply. The legislature recognizes the unique character and nature of water resources of the state. Because water is a resource that is subject to use and reuse, such as through return flows, and because at most times all water rights on a source will not be exercised to their full extent simultaneously, it is recognized that an adjudication is not a water availability study. Consequently, the legislature has provided an administrative forum for the factual investigation into whether water is available for new uses and changes both before and after the completion of an adjudication in the source of supply. To allow for orderly permitting in the absence of a complete adjudication in the source of supply, permits issued under this chapter are provisional. A provisional permit is subject to reduction, modification, or revocation by the department as provided in 85-2-313 upon completion of the general adjudication.

(6) It is the intent of the legislature that the establishment of a moratorium under 85-2-302 does not limit, expand, alter, or waive state jurisdiction to administer water rights within the exterior boundaries of an Indian reservation."

Section 2. Section 85-2-102, MCA, is amended to read:

"**85-2-102. (Temporary) Definitions.** Unless the context requires otherwise, in this chapter, the following definitions apply:

(1) "Appropriate" means to:

(a) divert, impound, or withdraw (including by stock for stock water) a quantity of water;

(b) in the case of a public agency, reserve water in accordance with 85-2-316;

(c) in the case of the department of fish, wildlife, and parks, lease water in accordance with 85-2-436; or

(d) in the Upper Clark Fork River basin, maintain and enhance streamflows to benefit the fishery resource in accordance with 85-2-439.

(2) "Beneficial use", unless otherwise provided, means:

(a) a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining,

municipal, power, and recreational uses;

(b) a use of water appropriated by the department for the state water leasing program under 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141;

(c) a use of water by the department of fish, wildlife, and parks pursuant to a lease authorized under 85-2-436; or

(d) a use of water to maintain and enhance streamflows to benefit the fishery resource in the Upper Clark Fork River basin as part of the Upper Clark Fork River basin instream flow pilot program authorized under 85-2-439.

(3) "Certificate" means a certificate of water right issued by the department.

(4) "Change in appropriation right" means a change in the place of diversion, the place of use, the purpose of use, or the place of storage.

(5) "Commission" means the fish, wildlife, and parks commission provided for in 2-15-3402.

(6) "Correct and complete" means that the information required to be submitted conforms to the standard of substantial credible information and that all of the necessary parts of the form requiring the information have been filled in with the required information.

(7) "Declaration" means the declaration of an existing right filed with the department under section 8, Chapter 452, Laws of 1973.

(8) "Department" means the department of natural resources and conservation provided for in Title 2, chapter 15, part 33.

(9) "Existing right" or "existing water right" means a right to the use of water that would be protected under the law as it existed prior to July 1, 1973. The term includes federal non-Indian and Indian reserved water rights created under federal law and water rights created under state law.

(10) "Ground water" means any water that is beneath the ground surface.

(11) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive presumption of abandonment under 85-2-226.

(12) "Permit" means the permit to appropriate issued by the department under 85-2-301 through 85-2-303 and 85-2-306 through 85-2-314.

(13) "Person" means an individual, association, partnership, corporation, state agency, political subdivision, the United States or any agency of the United States, or any other entity.

(14) "Political subdivision" means any county, incorporated city or town, public corporation, or

district created pursuant to state law or other public body of the state empowered to appropriate water. The term does not mean a private corporation, association, or group.

(15) "Salvage" means to make water available for beneficial use from an existing valid appropriation through application of water-saving methods.

(16) "State water reservation" means a water right created under state law after July 1, 1973, that reserves water for existing or future beneficial uses or that maintains a minimum flow, level, or quality of water throughout the year or at periods or for defined lengths of time.

~~(16)~~(17) "Substantial credible information" means probable, believable facts sufficient to support a reasonable legal theory upon which the department should proceed with the action requested by the person providing the information.

~~(17)~~(18) "Waste" means the unreasonable loss of water through the design or negligent operation of an appropriation or water distribution facility or the application of water to anything but a beneficial use.

~~(18)~~(19) "Water" means all water of the state, surface and subsurface, regardless of its character or manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage effluent.

~~(19)~~(20) "Water division" means a drainage basin as defined in 3-7-102.

~~(20)~~(21) "Water judge" means a judge as provided for in Title 3, chapter 7.

~~(21)~~(22) "Water master" means a master as provided for in Title 3, chapter 7.

~~(22)~~(23) "Watercourse" means any naturally occurring stream or river from which water is diverted for beneficial uses. It does not include ditches, culverts, or other ~~manmade~~ constructed waterways.

~~(23)~~(24) "Well" means any artificial opening or excavation in the ground, however made, by which ground water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn. (Terminates June 30, 1999--sec. 4, Ch. 740, L. 1991.)

85-2-102. (Effective July 1, 1999) Definitions. Unless the context requires otherwise, in this chapter, the following definitions apply:

(1) "Appropriate" means:

(a) to divert, impound, or withdraw (including by stock for stock water) a quantity of water;

(b) in the case of a public agency, to reserve water in accordance with 85-2-316; or

(c) in the Upper Clark Fork River basin, to maintain and enhance streamflows to benefit the fishery resource in accordance with 85-2-439.

(2) "Beneficial use", unless otherwise provided, means:

(a) a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses;

(b) a use of water appropriated by the department for the state water leasing program under 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141; or

(c) a use of water to maintain and enhance streamflows to benefit the fishery resource in the Upper Clark Fork River basin as part of the Upper Clark Fork River basin instream flow pilot program authorized under 85-2-439.

(3) "Certificate" means a certificate of water right issued by the department.

(4) "Change in appropriation right" means a change in the place of diversion, the place of use, the purpose of use, or the place of storage.

(5) "Correct and complete" means that the information required to be submitted conforms to the standard of substantial credible information and that all of the necessary parts of the form requiring the information have been filled in with the required information.

(6) "Declaration" means the declaration of an existing right filed with the department under section 8, Chapter 452, Laws of 1973.

(7) "Department" means the department of natural resources and conservation provided for in Title 2, chapter 15, part 33.

(8) "Existing right" or "existing water right" means a right to the use of water that would be protected under the law as it existed prior to July 1, 1973. The term includes federal non-Indian and Indian reserved water rights created under federal law and water rights created under state law.

(9) "Ground water" means any water that is beneath the ground surface.

(10) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive presumption of abandonment under 85-2-226.

(11) "Permit" means the permit to appropriate issued by the department under 85-2-301 through 85-2-303 and 85-2-306 through 85-2-314.

(12) "Person" means an individual, association, partnership, corporation, state agency, political subdivision, the United States or any agency of the United States, or any other entity.

(13) "Political subdivision" means any county, incorporated city or town, public corporation, or

district created pursuant to state law or other public body of the state empowered to appropriate water. The term does not mean a private corporation, association, or group.

(14) "Salvage" means to make water available for beneficial use from an existing valid appropriation through application of water-saving methods.

(15) "State water reservation" means a water right created under state law after July 1, 1973, that reserves water for existing or future beneficial uses or that maintains a minimum flow, level, or quality of water throughout the year or at periods or for defined lengths of time.

~~(15)~~(16) "Substantial credible information" means probable, believable facts sufficient to support a reasonable legal theory upon which the department should proceed with the action requested by the person providing the information.

~~(16)~~(17) "Waste" means the unreasonable loss of water through the design or negligent operation of an appropriation or water distribution facility or the application of water to anything but a beneficial use.

~~(17)~~(18) "Water" means all water of the state, surface and subsurface, regardless of its character or manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage effluent.

~~(18)~~(19) "Water division" means a drainage basin as defined in 3-7-102.

~~(19)~~(20) "Water judge" means a judge as provided for in Title 3, chapter 7.

~~(20)~~(21) "Water master" means a master as provided for in Title 3, chapter 7.

~~(21)~~(22) "Watercourse" means any naturally occurring stream or river from which water is diverted for beneficial uses. It does not include ditches, culverts, or other ~~manmade~~ constructed waterways.

~~(22)~~(23) "Well" means any artificial opening or excavation in the ground, however made, by which ground water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn. (Terminates June 30, 2005--sec. 14, Ch. 487, L. 1995.)

85-2-102. (Effective July 1, 2005) Definitions. Unless the context requires otherwise, in this chapter, the following definitions apply:

(1) "Appropriate" means to:

(a) divert, impound, or withdraw (including by stock for stock water) a quantity of water;

(b) in the case of a public agency, to reserve water in accordance with 85-2-316; or

(c) in the case of the department of fish, wildlife, and parks, to lease water in accordance with 85-2-436.

(2) "Beneficial use", unless otherwise provided, means:

(a) a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses;

(b) a use of water appropriated by the department for the state water leasing program under 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141; and

(c) a use of water by the department of fish, wildlife, and parks pursuant to a lease authorized under 85-2-436.

(3) "Certificate" means a certificate of water right issued by the department.

(4) "Change in appropriation right" means a change in the place of diversion, the place of use, the purpose of use, or the place of storage.

(5) "Commission" means the fish, wildlife, and parks commission provided for in 2-15-3402.

(6) "Correct and complete" means that the information required to be submitted conforms to the standard of substantial credible information and that all of the necessary parts of the form requiring the information have been filled in with the required information.

(7) "Declaration" means the declaration of an existing right filed with the department under section 8, Chapter 452, Laws of 1973.

(8) "Department" means the department of natural resources and conservation provided for in Title 2, chapter 15, part 33.

(9) "Existing right" or "existing water right" means a right to the use of water that would be protected under the law as it existed prior to July 1, 1973. The term includes federal non-Indian and Indian reserved water rights created under federal law and water rights created under state law.

(10) "Ground water" means any water that is beneath the ground surface.

(11) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive presumption of abandonment under 85-2-226.

(12) "Permit" means the permit to appropriate issued by the department under 85-2-301 through 85-2-303 and 85-2-306 through 85-2-314.

(13) "Person" means an individual, association, partnership, corporation, state agency, political subdivision, the United States or any agency ~~thereof~~ of the United States, or any other entity.

(14) "Political subdivision" means any county, incorporated city or town, public corporation, or

district created pursuant to state law or other public body of the state empowered to appropriate water. The term does not mean a private corporation, association, or group.

(15) "Salvage" means to make water available for beneficial use from an existing valid appropriation through application of water-saving methods.

(16) "State water reservation" means a water right created under state law after July 1, 1973, that reserves water for existing or future beneficial uses or that maintains a minimum flow, level, or quality of water throughout the year or at periods or for defined lengths of time.

~~(16)~~(17) "Substantial credible information" means probable, believable facts sufficient to support a reasonable legal theory upon which the department should proceed with the action requested by the person providing the information.

~~(17)~~(18) "Waste" means the unreasonable loss of water through the design or negligent operation of an appropriation or water distribution facility or the application of water to anything but a beneficial use.

~~(18)~~(19) "Water" means all water of the state, surface and subsurface, regardless of its character or manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage effluent.

~~(19)~~(20) "Water division" means a drainage basin as defined in 3-7-102.

~~(20)~~(21) "Water judge" means a judge as provided for in Title 3, chapter 7.

~~(21)~~(22) "Water master" means a master as provided for in Title 3, chapter 7.

~~(22)~~(23) "Watercourse" means any naturally occurring stream or river from which water is diverted for beneficial uses. It does not include ditches, culverts, or other ~~manmade~~ constructed waterways.

~~(23)~~(24) "Well" means any artificial opening or excavation in the ground, however made, by which ground water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn."

Section 3. Section 85-2-217, MCA, is amended to read:

"**85-2-217. Suspension of adjudication.** While negotiations for the conclusion of a compact under part 7 are being pursued, all proceedings to generally adjudicate reserved Indian water rights and federal reserved water rights of those tribes and federal agencies ~~which~~ that are negotiating are suspended. The obligation to file water rights claims for those federal non-Indian and Indian reserved rights is also suspended. This suspension ~~shall be~~ is effective until July 1, 1999, as long as negotiations are continuing

or ratification of a completed compact is being sought. If approval by the state legislature and tribes or federal agencies has not been accomplished by July 1, 1999, the suspension ~~shall~~ must terminate on that date. Upon termination of the suspension of this part, the tribes and the federal agencies ~~shall be~~ are subject to the special filing requirements of 85-2-702(3) and all other requirements of the state water adjudication system provided for in Title 85, chapter 2. Those tribes and federal agencies that choose not to negotiate their federal non-Indian and Indian reserved water rights are subject to the full operation of the state adjudication system and may not benefit from the suspension provisions of this section."

Section 4. Section 85-2-228, MCA, is amended to read:

"**85-2-228. Federal reserved water rights with priority date of July 1, 1973, or later -- process and adjudication -- purpose.** (1) The purpose of this section is to ensure that a federal reserved water right with a priority date of July 1, 1973, or later ~~be~~ is subject to the same process and adjudication as a federal reserved water right with a priority date before July 1, 1973.

(2) Under authority granted to the states by 43 U.S.C. 666, a federal reserved water right that has a priority date of July 1, 1973, or later and that is asserted by a federal agency is subject to the claim filing requirements and all other applicable requirements of the state water adjudication system provided for in Title 85, chapter 2, parts 2 and 7.

(3) At the request of a federal agency, the reserved water rights compact commission may negotiate to conclude a compact under Title 85, chapter 2, part 7, for a federal reserved water right with a priority date of July 1, 1973, or later.

(4) Whenever necessary, a water judge may reopen any decree issued pursuant to Title 85, chapter 2, to process the asserted or negotiated federal reserved water right."

Section 5. Section 85-2-301, MCA, is amended to read:

"**85-2-301. Right to appropriate -- recognition and confirmation of permits issued after July 1, 1973.** (1) After July 1, 1973, a person may not appropriate water except as provided in this chapter. A person may ~~only~~ appropriate water only for a beneficial use.

(2) (a) Only the department may appropriate water by permit in either of the following instances:

(i) for transport outside the following river basins:

(A) the Clark Fork River and its tributaries to its confluence with Lake Pend Oreille in Idaho;

(B) the Kootenai River and its tributaries to its confluence with Kootenay Lake in British Columbia;

(C) the St. Mary River and its tributaries to its confluence with the Oldman River in Alberta;

(D) the Little Missouri River and its tributaries to its confluence with Lake Sakakawea in North Dakota;

(E) the Missouri River and its tributaries to its confluence with the Yellowstone River in North Dakota; and

(F) the Yellowstone River and its tributaries to its confluence with the Missouri River in North Dakota; or

(ii) whenever water in excess of 4,000 acre-feet a year and 5.5 cubic feet per second, for any use, is to be consumed.

(b) Water for these purposes or in these amounts may be leased from the department by any person under the provisions of 85-2-141.

(3) A right to appropriate water may not be acquired by any other method, including by adverse use, adverse possession, prescription, or estoppel. The method prescribed by this chapter is exclusive.

(4) All permit actions of the department after July 1, 1973, are recognized and confirmed subject to this part and any terms, conditions, and limitations placed on a permit by the department."

Section 6. Section 85-2-302, MCA, is amended to read:

"**85-2-302. Application for permit.** (1) Except as otherwise provided in ~~(1) through (3) of~~ 85-2-306 (1) through (3), a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works ~~therefor~~ for water except by applying for and receiving a permit from the department. The application ~~shall~~ must be made on a form prescribed by the department. The department shall make the forms available through its offices and the offices of the county clerk and recorders. The applicant shall submit a correct and complete application. The department shall return a defective application for correction or completion, together with the reasons for returning it. An application does not lose priority of filing because of defects if the application is corrected, completed, and refiled with the department within 30 days after its return to the applicant or within a further time as the department may allow. If an application is not corrected and completed within 30 days or within a further time as the department allows, up to 3 months, the priority date of the application ~~shall~~ must be the date of refiling the application with the corrections with the department. An application not corrected within 3 months ~~shall~~

must be terminated.

(2) Prior to final adjudication and while negotiations for the conclusion of a compact under part 7 are being pursued or until July 1, 2003, whichever occurs first, there is a moratorium on the processing of permit applications for surface water on an affected Indian reservation."

Section 7. Section 85-2-311, MCA, is amended to read:

"**85-2-311. Criteria for issuance of permit.** (1) A permit may be issued under this part prior to the adjudication of existing water rights in a source of supply. In a permit proceeding under this part there is no presumption that an applicant for a permit cannot meet the statutory criteria of this section prior to the adjudication of existing water rights pursuant to this chapter. Except as provided in subsections (3) and (4), the department shall issue a permit if the applicant proves by a preponderance of evidence that the following criteria are met:

(a) there ~~are unappropriated waters in the source of supply~~ is water physically available at the proposed point of diversion~~:~~

~~(i) at times when the water can be put to the use proposed by the applicant;~~

~~(ii)~~ in the amount that the applicant seeks to appropriate; and

~~(iii) during the period in which the applicant seeks to appropriate, in the amount requested and that is reasonably available;~~

(b) the water rights of a prior appropriator will not be adversely affected. In this subsection (1)(b), adverse effect must be determined based on a consideration of:

(i) whether water can reasonably be considered legally available based on the records of the department and other evidence provided to the department; and

(ii) an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied~~;~~.

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

~~(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved;~~

~~(f)~~(e) the applicant has a possessory interest, or the written consent of the person with the

possessory interest, in the property where the water is to be put to beneficial use;

~~(g)~~(f) the water quality of a prior appropriator will not be adversely affected;

~~(h)~~(g) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and

~~(i)~~(h) the ability of a discharge permitholder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

(2) The applicant is required to prove that the criteria in subsections ~~(1)(g)~~ (1)(f) through ~~(1)(i)~~ (1)(h) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection ~~(1)(g)~~ (1)(f), ~~(1)(h)~~ (1)(g), or ~~(1)(i)~~ (1)(h), as applicable, may not be met. For the criteria set forth in subsection ~~(1)(h)~~ (1)(g), only the department of environmental quality or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection.

(3) The department may not issue a permit for an appropriation of 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water unless the applicant proves by clear and convincing evidence that:

(a) the criteria in subsection (1) are met;

~~(b) the rights of a prior appropriator will not be adversely affected;~~

~~(c)~~(b) the proposed appropriation is a reasonable use. A finding must be based on a consideration of the following:

(i) the existing demands on the state water supply, as well as projected demands, such as reservations of water for future beneficial purposes, including municipal water supplies, irrigation systems, and minimum streamflows for the protection of existing water rights and aquatic life;

(ii) the benefits to the applicant and the state;

(iii) the effects on the quantity and quality of water for existing beneficial uses in the source of supply;

(iv) the availability and feasibility of using low-quality water for the purpose for which application has been made;

(v) the effects on private property rights by any creation of or contribution to saline seep; and

(vi) the probable significant adverse environmental impacts of the proposed use of water as determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

(4) (a) The state of Montana has long recognized the importance of conserving its public waters and the necessity to maintain adequate water supplies for the state's water requirements, including requirements for federal non-Indian and Indian reserved water rights held by the United States for federal reserved lands and in trust for the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes that, under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict with the public welfare of its citizens or the conservation of its waters, the criteria in this subsection (4) must be met before out-of-state use may occur.

(b) The department may not issue a permit for the appropriation of water for withdrawal and transportation for use outside the state unless the applicant proves by clear and convincing evidence that:

(i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of subsection (1) or (3) are met;

(ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and

(iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens of Montana.

(c) In determining whether the applicant has proved by clear and convincing evidence that the requirements of subsections (4)(b)(ii) and (4)(b)(iii) are met, the department shall consider the following factors:

(i) whether there are present or projected water shortages within the state of Montana;

(ii) whether the water that is the subject of the application could feasibly be transported to alleviate water shortages within the state of Montana;

(iii) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and

(iv) the demands placed on the applicant's supply in the state where the applicant intends to use the water.

(d) When applying for a permit or a lease to withdraw and transport water for use outside the state, the applicant shall submit to and comply with the laws of the state of Montana governing the appropriation, lease, and use of water.

(5) To meet the preponderance of evidence standard in this section, the applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information

developed by the applicant, the department, the U.S. geological survey, or the U.S. natural resources conservation service and other specific field studies.

(6) An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion, impoundment, use, or restraint contrary to the provisions of this section is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized appropriation, diversion, impoundment, use, or other restraint. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to appropriate, divert, impound, use, or otherwise restrain or control waters within the boundaries of this state except in accordance with this section.

(7) The department may adopt rules to implement the provisions of this section."

Section 8. Section 85-2-313, MCA, is amended to read:

"**85-2-313. Provisional permit.** A permit issued prior to a final determination of existing water rights is provisional and is subject to that final determination. ~~The~~ Upon petition, the amount of the appropriation granted in a provisional permit ~~shall~~ must be reduced ~~or~~, modified, or revoked by the department in a show cause hearing ~~where~~ when necessary to protect and guarantee existing water rights determined in the final decree. Because a provisional permit is issued on a reasonable determination of legal availability under 85-2-311(1)(b), in a show cause hearing under this section, legal availability must be determined on a consideration of the final decree in the affected basin or subbasin. A person may not obtain any vested right to an appropriation obtained under a provisional permit by virtue of construction of diversion works, purchase of equipment to apply water, planting of crops, or other action where the permit would have been denied or modified if the final decree had been available to the department."

Section 9. Section 85-2-316, MCA, is amended to read:

"**85-2-316. ~~Reservation~~ State reservation of waters.** (1) The state, ~~or~~ any political subdivision or agency of the state, or the United States or any agency of the United States may apply to the department to ~~reserve waters~~ acquire a state water reservation for existing or future beneficial uses or to maintain a minimum flow, level, or quality of water throughout the year or at periods or for a length of time that the department designates.

(2) (a) Water may be reserved for existing or future beneficial uses in the basin where it is reserved,

as described by the following basins:

(i) the Clark Fork River and its tributaries to its confluence with Lake Pend Oreille in Idaho;

(ii) the Kootenai River and its tributaries to its confluence with Kootenay Lake in British Columbia;

(iii) the St. Mary River and its tributaries to its confluence with the Oldman River in Alberta;

(iv) the Little Missouri River and its tributaries to its confluence with Lake Sakakawea in North Dakota;

(v) the Missouri River and its tributaries to its confluence with the Yellowstone River in North Dakota; and

(vi) the Yellowstone River and its tributaries to its confluence with the Missouri River in North Dakota.

(b) A state water reservation may be made for an existing or future beneficial use outside the basin where the diversion occurs only if stored water is not reasonably available for water leasing under 85-2-141 and the proposed use would occur in a basin designated in subsection (2)(a).

(3) Upon receiving a correct and complete application, the department shall proceed in accordance with 85-2-307 through 85-2-309. After the hearing provided for in 85-2-309, the department shall decide whether to reserve the water for the applicant. The department's costs of giving notice, holding the hearing, conducting investigations, and making records incurred in acting upon the application to reserve water, except the cost of salaries of the department's personnel, must be paid by the applicant. In addition, a reasonable proportion of the department's cost of preparing an environmental impact statement must be paid by the applicant unless waived by the department upon a showing of good cause by the applicant.

(4) (a) The department may not adopt an order reserving water unless the applicant establishes to the satisfaction of the department by a preponderance of evidence:

(i) the purpose of the reservation;

(ii) the need for the reservation;

(iii) the amount of water necessary for the purpose of the reservation;

(iv) that the reservation is in the public interest.

(b) In determining the public interest under subsection (4)(a)(iv), the department may not adopt an order reserving water for withdrawal and transport for use outside the state unless the applicant proves by clear and convincing evidence that:

(i) the proposed out-of-state use of water is not contrary to water conservation in Montana; and

(ii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens of Montana.

(c) In determining whether the applicant has proved by clear and convincing evidence that the requirements of subsections (4)(b)(i) and (4)(b)(ii) are met, the department shall consider the following factors:

(i) whether there are present or projected water shortages within the state of Montana;

(ii) whether the water that is the subject of the application could feasibly be transported to alleviate water shortages within the state of Montana;

(iii) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and

(iv) the demands placed on the applicant's supply in the state where the applicant intends to use the water.

(d) When applying for a state water reservation to withdraw and transport water for use outside the state, the applicant shall submit to and comply with the laws of the state of Montana governing the appropriation, lease, use, and reservation of water.

(5) If the purpose of the state water reservation requires construction of a storage or diversion facility, the applicant shall establish to the satisfaction of the department by a preponderance of evidence that there will be progress toward completion of the facility and accomplishment of the purpose with reasonable diligence in accordance with an established plan.

(6) The department shall limit any state water reservations after May 9, 1979, for maintenance of minimum flow, level, or quality of water that it awards at any point on a stream or river to a maximum of 50% of the average annual flow of record on gauged streams. Ungauged streams can be allocated at the discretion of the department.

(7) After the adoption of an order reserving waters, the department may reject an application and refuse a permit for the appropriation of reserved waters or may issue the permit subject to terms and conditions that it considers necessary for the protection of the objectives of the reservation.

(8) (a) A person desiring to use water reserved to a conservation district for agricultural purposes shall make application for the use with the district, and the district, upon approval of the application, shall inform the department of the approved use and issue the applicant an authorization for the use. The department shall maintain records of all uses of water reserved to conservation districts and be responsible,

when requested by the districts, for rendering technical and administrative assistance within the department's staffing and budgeting limitations in the preparation and processing of the applications for the conservation districts. The department shall, within its staffing and budgeting limitations, complete any feasibility study requested by the districts within 12 months of the time that the request was made. The department shall extend the time allowed to develop a plan identifying projects for using a district's reservation as long as the conservation district makes a good faith effort, within its staffing and budget limitations, to develop a plan.

(b) Upon actual application of water to the proposed beneficial use, the authorized user shall notify the conservation district. The notification must contain a certified statement by a person with experience in the design, construction, or operation of project works for agricultural purposes describing how the reserved water was put to use. The department or the district may then inspect the appropriation to determine if it has been completed in substantial accordance with the authorization.

(9) Except as provided in 85-2-331, the priority of appropriation of a state water reservation and the relative priority of the reservation to permits with a later priority of appropriation must be determined according to this subsection (9), as follows:

(a) A state water reservation under this section has a priority of appropriation dating from the filing with the department of a notice of intention to apply for a state water reservation in a basin in which no other notice of intention to apply is currently pending. The notice of intention to apply must specify the basin in which the applicant is seeking a state water reservation.

(b) Upon receiving a notice of intention to apply for a state water reservation, the department shall identify all potential state water reservation applicants in the basin specified in the notice and notify each potential applicant of the opportunity to submit an application and to receive a state water reservation with the priority of appropriation as described in subsection (9)(a).

(c) To receive the priority of appropriation described in subsection (9)(a), the applicant shall submit a correct and complete state water reservation application within 1 year after the filing of the notice of intention to apply. Upon a showing of good cause, the department may extend the time for preparing the application.

(d) The department may by order subordinate a state water reservation to a permit issued pursuant to this part if:

(i) the permit application was accepted by the department before the date of the order granting the

reservation; and

(ii) the effect of subordinating the reservation to one or more permits does not interfere substantially with the purpose of the reservation.

(e) The department shall by order establish the relative priority of state water reservations approved under this section that have the same day of priority. A state water reservation may not adversely affect any rights in existence at that time.

(10) The department shall, periodically but at least once every 10 years, review existing state water reservations to ensure that the objectives of the ~~reservation~~ reservations are being met. When the objectives of ~~the~~ a state water reservation are not being met, the department may extend, revoke, or modify the reservation. Any undeveloped water made available as a result of a revocation or modification under this subsection is available for appropriation by others pursuant to this part.

(11) The department may modify an existing or future order originally adopted to reserve water for the purpose of maintaining minimum flow, level, or quality of water, so as to reallocate the state water reservation or portion of the reservation to an applicant who is a qualified reservant under this section. Reallocation of ~~reserved~~ water reserved pursuant to a state water reservation may be made by the department following notice and hearing if the department finds that all or part of the reservation is not required for its purpose and that the need for the reallocation has been shown by the applicant to outweigh the need shown by the original reservant. Reallocation of reserved water may not adversely affect the priority date of the reservation, and the reservation retains its priority date despite reallocation to a different entity for a different use. The department may not reallocate water reserved under this section on any stream or river more frequently than once every 5 years.

(12) A reservant may not make a change in a state water reservation under this section, except as permitted under 85-2-402 and this subsection. If the department approves a change, the department shall give notice and require the reservant to establish that the criteria in subsection (4) will be met under the approved change.

(13) A state water reservation may be transferred to another entity qualified to hold a reservation under subsection (1). Only the entity holding the reservation may initiate a transfer. The transfer occurs upon the filing of a water right transfer certificate with the department, together with an affidavit from the entity receiving the reservation establishing that the entity is a qualified reservant under subsection (1), that the entity agrees to comply with the requirements of this section and the conditions of the reservation, and

that the entity can meet the objectives of the reservation as granted. If the transfer of a state water reservation involves a change in an appropriation right, the necessary approvals must be acquired pursuant to subsection (12).

(14) Nothing in this section vests the department with the authority to alter a water right that is not a state water reservation.

(15) The department shall undertake a program to educate the public, other state agencies, and political subdivisions of the state as to the benefits of the state water reservation process and the procedures to be followed to secure the reservation of water. The department shall provide technical assistance to other state agencies and political subdivisions in applying for reservations under this section.

(16) Water reserved under this section is not subject to the state water leasing program established under 85-2-141."

Section 10. Section 85-2-321, MCA, is amended to read:

"**85-2-321. Milk River basin -- suspension of action on permits -- proposal -- priority in adjudication process.** (1) (a) In order to balance the need for the continued development of Montana's water and for protection of existing rights in the Milk River basin, the department may suspend action on a class of applications or may close a source in the basin and refuse to accept a class of applications, or both, for a permit under this part to appropriate from that source in the basin.

(b) Suspension or closure, or both, may only be proposed by the department.

(c) The proposal must state the source in the basin and class of applications for which suspension or closure, or both, is being proposed and any of the following allegations:

(i) that the frequency of occurrence of unappropriated waters is such that:

(A) any new appropriation from the source for the class of applications will adversely affect the rights of a prior appropriation from the source; or

(B) any new appropriation from the source for the class of applications will interfere unreasonably with another planned use or development for which a permit has been given or for which water has been reserved pursuant to this part in the source; or

(ii) that significant disputes or enforcement problems regarding priority of rights or amounts or duration of water in use by appropriators are in progress or will arise.

(2) After April 8, 1985, the chief water judge shall make issuance of a temporary preliminary

decree in the Milk River basin the highest priority in the adjudication of existing water rights pursuant to Title 85, chapter 2, part 2."

Section 11. Section 85-2-329, MCA, is amended to read:

"**85-2-329. Definitions.** Unless the context requires otherwise, in 85-2-330 and this section, the following definitions apply:

(1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302 or a state water reservation pursuant to 85-2-316.

(2) "Ground water" means water that is beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water and that is not immediately or directly connected to surface water.

(3) "Nonconsumptive use" means a beneficial use of water that does not cause a reduction in the source of supply and in which substantially all of the water returns without delay to the source of supply, causing little or no disruption in stream conditions.

(4) "Teton River basin" means the drainage area of the Teton River and its tributaries above the confluence of the Teton and Marias Rivers."

Section 12. Section 85-2-331, MCA, is amended to read:

"**85-2-331. Reservations within Missouri River basin and Little Missouri River basin.** (1) The state, ~~of~~ an agency or political subdivision of the state, or the United States or an agency of the United States that desires to apply for a state water reservation ~~of water~~ in the Missouri River basin or in the Little Missouri River basin shall file an application pursuant to 85-2-316 no later than:

(a) July 1, 1989, for reservation of water above Fort Peck dam; or

(b) July 1, 1991, for reservation of water below Fort Peck dam and in the Little Missouri River basin.

(2) Subject to legislative appropriation, the department shall provide technical and financial assistance to other state agencies and political subdivisions in applying for state water reservations within the Missouri River basin and the Little Missouri River basin.

(3) (a) The department shall make a final determination in accordance with 85-2-316 on all applications filed before July 1, 1989, for state water reservations ~~of water~~ in the Missouri River basin

above Fort Peck dam.

(b) The department shall make a final determination in accordance with 85-2-316 on all applications filed before July 1, 1991, for state water reservations ~~of water~~ in the Missouri River basin below Fort Peck dam and in the Little Missouri River basin.

(c) The department shall determine which applications or portions of applications are considered to be above or below Fort Peck dam.

(4) ~~Water~~ State water reservations approved by the department under this section have a priority date of July 1, 1985, in the Missouri River basin and a priority date of July 1, 1989, in the Little Missouri River basin. If the department issues a permit under Title 85, chapter 2, part 3, prior to the granting of a state water reservation under this section, the department may subordinate the state water reservation to the permit if it finds that the subordination does not interfere substantially with the purpose of any state water reservation. The department shall by order establish the relative priority of applications approved under this section."

Section 13. Section 85-2-336, MCA, is amended to read:

"**85-2-336. Basin closure -- exception.** (1) As provided in 85-2-319 and subject to the provisions of subsection (2) of this section, the department may not process or grant an application for a permit to appropriate water within the Upper Clark Fork River basin.

(2) The provisions of subsection (1) do not apply to:

(a) an application for a permit to appropriate ground water;

(b) an application filed prior to January 1, 2000, for a permit to appropriate water to conduct response actions or remedial actions pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, or Title 75, chapter 10, part 7, at sites designated as of January 1, 1994. The total flow rates for all permits issued under this subsection (2)(b) may not exceed 10 cubic feet per second. A permit issued to conduct response actions or remedial actions may not be used for dilution and must be limited to a term not to exceed the necessary time to complete the response or remedial action, and the permit may not be transferred to any person for any purpose other than the designated response or remedial action;

(c) an application for a permit to appropriate water for stock use;

(d) an application to store water; or

(e) an application for power generation at existing hydroelectric dams. The department may not approve a permit for power generation if approval results in additional consumption of water.

(3) Applications for state water reservations in the Upper Clark Fork River basin filed pursuant to 85-2-316 and pending as of May 1, 1991, have a priority date of May 1, 1991. The filing of a state water reservation application does not provide standing to object under 85-2-402.

(4) The department may not process or approve applications for state water reservations ~~of water~~ in the Upper Clark Fork River basin filed pursuant to 85-2-316."

Section 14. Section 85-2-340, MCA, is amended to read:

"85-2-340. Definitions. Unless the context requires otherwise, in 85-2-341 and this section, the following definitions apply:

(1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302 or a state water reservation pursuant to 85-2-316.

(2) "Ground water" means water that is beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water and that is not immediately or directly connected to surface water.

(3) "Jefferson River basin" means the drainage area of the Jefferson River and its tributaries above the confluence of the Jefferson and Missouri Rivers.

(4) "Madison River basin" means the drainage area of the Madison River and its tributaries above the confluence of the Madison and Jefferson Rivers.

(5) "Nonconsumptive use" means a beneficial use of water that does not cause a reduction in the source of supply and in which substantially all of the water returns without delay to the source of supply, causing little or no disruption in stream conditions."

Section 15. Section 85-2-341, MCA, is amended to read:

"85-2-341. Basin closure -- exceptions. (1) As provided in 85-2-319 and subject to the provisions of subsection (2) of this section, the department may not process or grant an application for a permit to appropriate water or for a state water reservation to reserve water within the Jefferson River basin or Madison River basin.

(2) The provisions of subsection (1) do not apply to:

(a) an application for a permit to appropriate ground water;

(b) an application for a permit to appropriate water for a nonconsumptive use;

(c) an application for a permit to appropriate water for domestic, municipal, or stock use;

(d) an application to store water during high spring flows; or

(e) temporary emergency appropriations as provided for in 85-2-113(3)."

Section 16. Section 85-2-342, MCA, is amended to read:

"**85-2-342. Definitions.** Unless the context requires otherwise, in 85-2-343 and this section, the following definitions apply:

(1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302 or a state water reservation pursuant to 85-2-316.

(2) "Ground water" means water that is beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water and that is not immediately or directly connected to surface water.

(3) "Nonconsumptive use" means a beneficial use of water that does not cause a reduction in the source of supply and in which substantially all of the water returns without delay to the source of supply, causing little or no disruption in stream conditions.

(4) "Upper Missouri River basin" means the drainage area of the Missouri River and its tributaries above Morony dam."

Section 17. Section 85-2-401, MCA, is amended to read:

"**85-2-401. Priority -- recognition and confirmation of changes in appropriations issued after July 1, 1973.** (1) As between appropriators, the first in time is the first in right. Priority of appropriation does not include the right to prevent changes by later appropriators in the condition of water occurrence, such as the increase or decrease of streamflow or the lowering of a water table, artesian pressure, or water level, if the prior appropriator can reasonably exercise ~~his~~ the water right under the changed conditions.

(2) Priority of appropriation made under this chapter dates from the filing of an application for a permit with the department, except as otherwise provided in 85-2-301 through 85-2-303, 85-2-306, 85-2-310(3), and 85-2-313.

(3) Priority of appropriation perfected before July 1, 1973, ~~shall~~ must be determined as provided

in part 2 of this chapter.

(4) All changes in appropriation rights actions of the department after July 1, 1973, are recognized and confirmed subject to this part and any terms, conditions, and limitations placed on a change in appropriation authorization by the department."

Section 18. Section 85-2-402, MCA, is amended to read:

"**85-2-402. (Temporary) Changes in appropriation rights.** (1) The right to make a change subject to the provisions of this section in an existing water right, a permit, or a state water reservation is recognized and confirmed. In a change proceeding under this section, there is no presumption that an applicant for a change in appropriation right cannot establish lack of adverse effect prior to the adjudication of other rights in the source of supply pursuant to this chapter. An applicant for a change in appropriation right must be given the opportunity to establish lack of adverse effect as an evidentiary matter by showing by reference to the applicant's own existing water right and historic water use practices that the proposed change in appropriation right will not increase the amount of water consumed or adversely alter the timing or pattern of flow for perfected uses in the source of the supply. An appropriator may not make a change in an appropriation right except, as permitted under this section, by applying for and receiving the approval of the department or, if applicable, of the legislature. An applicant shall submit a correct and complete application.

(2) Except as provided in subsections (4) through (6), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

(a) The proposed ~~use~~ change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which ~~water has been reserved~~ a state water reservation has been issued under part 3.

(b) Except for a lease authorization pursuant to 85-2-436, a temporary change authorization for instream use to benefit the fishery resource pursuant to 85-2-408, or water use pursuant to 85-2-439 when authorization does not require appropriation works, the proposed means of diversion, construction, and operation of the appropriation works are adequate.

(c) The proposed use of water is a beneficial use.

(d) Except for a lease authorization pursuant to 85-2-436 or a temporary change authorization pursuant to 85-2-408 for instream flow to benefit the fishery resource, the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

(e) If the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water asserted by the applicant.

(f) The water quality of an appropriator will not be adversely affected.

(g) The ability of a discharge permitholder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

(3) The applicant is required to prove that the criteria in subsections (2)(f) and (2)(g) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (2)(f) or (2)(g), as applicable, may not be met.

(4) The department may not approve a change in purpose of use or place of use of an appropriation of 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water unless the appropriator proves by a preponderance of evidence that:

(a) the criteria in subsection (2) are met; and

(b) the proposed change is a reasonable use. A finding of reasonable use must be based on a consideration of:

(i) the existing demands on the state water supply, as well as projected demands for water for future beneficial purposes, including municipal water supplies, irrigation systems, and minimum streamflows for the protection of existing water rights and aquatic life;

(ii) the benefits to the applicant and the state;

(iii) the effects on the quantity and quality of water for existing uses in the source of supply;

(iv) the availability and feasibility of using low-quality water for the purpose for which application has been made;

(v) the effects on private property rights by any creation of or contribution to saline seep; and

(vi) the probable significant adverse environmental impacts of the proposed use of water as determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

(5) The department may not approve a change in purpose of use or place of use for a diversion that

results in 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water being consumed unless:

(a) the applicant proves by clear and convincing evidence and the department finds that the criteria in subsections (2) and (4) are met; and

(b) the department then petitions the legislature and the legislature affirms the decision of the department after one or more public hearings.

(6) The state of Montana has long recognized the importance of conserving its public waters and the necessity to maintain adequate water supplies for the state's water requirements, including requirements for federal non-Indian and Indian reserved water rights held by the United States for federal reserved lands and in trust for the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes that, under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict with the public welfare of its citizens or the conservation of its waters, the following criteria must be met before out-of-state use may occur:

(a) The department and, if applicable, the legislature may not approve a change in appropriation right for the withdrawal and transportation of appropriated water for use outside the state unless the appropriator proves by clear and convincing evidence and, if applicable, the legislature approves after one or more public hearings that:

(i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of subsection (2) or (4) are met;

(ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and

(iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens of Montana.

(b) In determining whether the appropriator has proved by clear and convincing evidence that the requirements of subsections (6)(a)(ii) and (6)(a)(iii) will be met, the department and, if applicable, the legislature shall consider the following factors:

(i) whether there are present or projected water shortages within the state of Montana;

(ii) whether the water that is the subject of the proposed change in appropriation might feasibly be transported to alleviate water shortages within the state of Montana;

(iii) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and

(iv) the demands placed on the applicant's supply in the state where the applicant intends to use the water.

(c) When applying for a change in appropriation right to withdraw and transport water for use outside the state, the applicant shall submit to and comply with the laws of the state of Montana governing the appropriation and use of water.

(7) For any application for a change in appropriation right involving 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water, the department shall give notice of the proposed change in accordance with 85-2-307 and shall hold one or more hearings in accordance with 85-2-309 prior to its approval or denial of the proposed change. The department shall provide notice and may hold one or more hearings upon any other proposed change if it determines that a change might adversely affect the rights of other persons.

(8) The department or the legislature, if applicable, may approve a change subject to terms, conditions, restrictions, and limitations as it considers necessary to satisfy the criteria of this section, including limitations on the time for completion of the change. The department may extend time limits specified in the change approval under the applicable criteria and procedures of 85-2-312(3).

(9) Upon actual application of water to the proposed beneficial use within the time allowed, the appropriator shall notify the department that the appropriation has been completed. The notification must contain a certified statement by a person with experience in the design, construction, or operation of appropriation works describing how the appropriation was completed.

(10) If a change is not completed as approved by the department or legislature or if the terms, conditions, restrictions, and limitations of the change approval are not complied with, the department may, after notice and opportunity for hearing, require the appropriator to show cause why the change approval should not be modified or revoked. If the appropriator fails to show sufficient cause, the department may modify or revoke the change approval.

(11) The original of a change approval issued by the department must be sent to the applicant, and a duplicate must be kept in the office of the department in Helena.

(12) A person holding an issued permit or change approval that has not been perfected may change the place of diversion, place of use, purpose of use, or place of storage by filing an application for change pursuant to this section.

(13) A change in appropriation right contrary to the provisions of this section is invalid. An officer,

(iv) the demands placed on the applicant's supply in the state where the applicant intends to use the water.

(c) When applying for a change in appropriation right to withdraw and transport water for use outside the state, the applicant shall submit to and comply with the laws of the state of Montana governing the appropriation and use of water.

(7) For any application for a change in appropriation right involving 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water, the department shall give notice of the proposed change in accordance with 85-2-307 and shall hold one or more hearings in accordance with 85-2-309 prior to its approval or denial of the proposed change. The department shall provide notice and may hold one or more hearings upon any other proposed change if it determines that a change might adversely affect the rights of other persons.

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(13) A change in appropriation right contrary to the provisions of this section is invalid. An officer,

agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized change in appropriation right. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to change an appropriation right except in accordance with this section.

(14) The department may adopt rules to implement the provisions of this section. (Terminates June 30, 1999--sec. 4, Ch. 740, L. 1991.)

85-2-402. (Effective July 1, 1999) Changes in appropriation rights. (1) The right to make a change subject to the provisions of this section in an existing water right, a permit, or a state water reservation is recognized and confirmed. In a change proceeding under this section, there is no presumption that an applicant for a change in appropriation right cannot establish lack of adverse effect prior to the adjudication of other rights in the source of supply pursuant to this chapter. An applicant for a change in appropriation right must be given the opportunity to establish lack of adverse effect as an evidentiary matter by showing by reference to the applicant's own existing water right and historic water use practices that the proposed change in appropriation right will not increase the amount of water consumed or adversely alter the timing or pattern of flow for perfected uses in the source of the supply. An appropriator may not make a change in an appropriation right except, as permitted under this section, by applying for and receiving the approval of the department or, if applicable, of the legislature. An applicant shall submit a correct and complete application.

(2) Except as provided in subsections (4) through (6), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

(a) The proposed ~~use~~ change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which ~~water has been reserved~~ a state water reservation has been issued under part 3.

(b) Except for a temporary change authorization pursuant to 85-2-408 or for water use pursuant to 85-2-439 that does not require appropriation works, the proposed means of diversion, construction, and operation of the appropriation works are adequate.

(c) The proposed use of water is a beneficial use.

(d) Except for a temporary change authorization pursuant to 85-2-408 for instream flow to benefit

the fishery resource, the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

(e) If the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water asserted by the applicant.

(f) The water quality of an appropriator will not be adversely affected.

(g) The ability of a discharge permitholder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

(3) The applicant is required to prove that the criteria in subsections (2)(f) and (2)(g) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (2)(f) or (2)(g), as applicable, may not be met.

(4) The department may not approve a change in purpose of use or place of use of an appropriation of 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water unless the appropriator proves by a preponderance of evidence that:

(a) the criteria in subsection (2) are met; and

(b) the proposed change is a reasonable use. A finding of reasonable use must be based on a consideration of:

(i) the existing demands on the state water supply, as well as projected demands for water for future beneficial purposes, including municipal water supplies, irrigation systems, and minimum streamflows for the protection of existing water rights and aquatic life;

(ii) the benefits to the applicant and the state;

(iii) the effects on the quantity and quality of water for existing uses in the source of supply;

(iv) the availability and feasibility of using low-quality water for the purpose for which application has been made;

(v) the effects on private property rights by any creation of or contribution to saline seep; and

(vi) the probable significant adverse environmental impacts of the proposed use of water as determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

(5) The department may not approve a change in purpose of use or place of use for a diversion that results in 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water being consumed unless:

(a) the applicant proves by clear and convincing evidence and the department finds that the criteria in subsections (2) and (4) are met; and

(b) the department then petitions the legislature and the legislature affirms the decision of the department after one or more public hearings.

(6) The state of Montana has long recognized the importance of conserving its public waters and the necessity to maintain adequate water supplies for the state's water requirements, including requirements for federal non-Indian and Indian reserved water rights held by the United States for federal reserved lands and in trust for the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes that, under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict with the public welfare of its citizens or the conservation of its waters, the following criteria must be met before out-of-state use may occur:

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(i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of subsection (2) or (4) are met;

(ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and

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(b) In determining whether the appropriator has proved by clear and convincing evidence that the requirements of subsections (6)(a)(ii) and (6)(a)(iii) will be met, the department and, if applicable, the legislature shall consider the following factors:

(i) whether there are present or projected water shortages within the state of Montana;

(ii) whether the water that is the subject of the proposed change in appropriation might feasibly be transported to alleviate water shortages within the state of Montana;

(iii) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and

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(8) The department or the legislature, if applicable, may approve a change subject to such terms, conditions, restrictions, and limitations as it considers necessary to satisfy the criteria of this section, including limitations on the time for completion of the change. The department may extend time limits specified in the change approval under the applicable criteria and procedures of 85-2-312(3).

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personally or through an agent, officer, or employee, attempt to change an appropriation right except in accordance with this section.

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(2) Except as provided in subsections (4) through (6), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

(a) The proposed ~~use~~ change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which ~~water has been reserved~~ a state water reservation has been issued under part 3.

(b) The proposed means of diversion, construction, and operation of the appropriation works are adequate.

(c) The proposed use of water is a beneficial use.

(d) The applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

(e) If the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water asserted by the applicant.

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(3) The applicant is required to prove that the criteria in subsections (2)(f) and (2)(g) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (2)(f) or (2)(g), as applicable, may not be met.

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(14) The department may adopt rules to implement the provisions of this section."

NEW SECTION. **Section 19. Notification to tribal governments.** The secretary of state shall send a copy of [this act] to each tribal government located on the seven Montana reservations.

NEW SECTION. **Section 20. {standard} Saving clause.** [This act] does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before [the effective date of this act].

NEW SECTION. **Section 21. Retroactive applicability.** [Section 1] applies retroactively, within the meaning of 1-2-109, to all permits and change authorizations issued by the department of natural resources and conservation after July 1, 1973.

NEW SECTION. **Section 22. Effective date.** [This act] is effective on passage and approval.

-END-

MINUTES

MONTANA SENATE
55TH LEGISLATURE - REGULAR SESSION

COMMITTEE ON NATURAL RESOURCES

Call to Order: By **VICE CHAIRMAN WILLIAM CRISMORE**, on January 17, 1997, at 1:00 P.M. in Room 405.

ROLL CALL

Members Present:
Sen. Lorents Grosfield, Chairman (R)
Sen. William S. Crismore, Vice Chairman (R)
Sen. Vivian M. Brooke (D)
Sen. Mack Cole (R)
Sen. Thomas F. Keating (R)
Sen. Dale Mahlum (R)
Sen. Mike Taylor (R)
Sen. Fred R. Van Valkenburg (D)

Members Excused: **Sen. Bea McCarthy (D)**
Sen. Ken Miller (R)

Members Absent: **None**

Staff Present: Larry Mitchell, Legislative Services Division
Gayle Hayley, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:
Hearings(s) & Date(s) Posted: SB97 1/3/97

HEARING ON SENATE BILL 97

Sponsor: **SENATOR LORENTS GROSFIELD, SD 13, BIG TIMBER**

Proponents: **Bud Clinch, Director, Department of Natural Resources and Conservation**
Holly Franz, Montana Power Co.
Mike Murphy, Montana Water Resources Assoc.
John Bloomquist, Montana Stockgrowers
Jan Rehberg, Crowley Law Firm
Jon Metropolis, Flathead Joint Board of Control
Don McIntyre, Attorney, DNRC
John Youngberg, Montana Farm Bureau

Opponents: **None**

Opening Statement by Sponsor: **LORENTS GROSFIELD, SD 13, BIG TIMBER**, stated he was sponsoring this bill at the request of Department of Natural Resources and Conservation. SB 97 will reverse the decision made by the Supreme Court of Montana concerning permitting and the change of water rights within the boundaries of the Flathead Indian Reservation. He said it dealt with some very difficult issues and the best way to explain it was to discuss SB1, which had a clarification problem, because there was some question concerning the meaning of the statute. There has been other cases where the court thought the statute meant one thing when really the legislation meant another thing. He said that was the case in this bill and the Dept. and others, including himself, believed that the court just made a mistake in this case. He said SB97 will put the law back to a status quo. This case involved changes of water rights within the boundaries of the Flathead Indian Reservation where the tribe objected, and it went through the court systems. The bottom line was that the Supreme Court decision, August 22, 1996, basically said that nobody within the boundaries of the Flathead Indian Reservation could be granted a permit or a change of water rights under state law until the adjudication was final. The Court said that the tests required in the statute cannot be met, therefore the Department cannot issue any more permits. **SEN. GROSFIELD** said theoretically, the case only applies to that instance, the Flathead Reservation, however, **Chief Justice Turnage** warned that there was nothing to prevent the logic of this case from extending beyond the boundary of this particular reservation and could apply to other reservations. He said what we are dealing with are federal & Indian reserved rights. There is federal reserved rights on the Forest Service, BLM, etc., and he believed that the same logic could potentially apply to all Forest Service land, all BLM land in Montana. He said the case was about suspending our whole water rights's process for the indefinite future until the adjudication process is finalized, which may be decades from now. **SEN. GROSFIELD** referred to page 12, lines 28 & 29, and specifically the last word on line 29, "reserved". That was the word that the Court misunderstood as federal reserved water rights. He said that word has never referred to federal reserved water rights and was never intended to refer to federal reserved water rights. He understood why the Court might have gotten confused because if you look on page 14, lines 3 & 4, and look at the original language of the statute, it says "including requirements for reserved water rights held by the United States for federal reserved lands and...." On the bottom on page 12, line 29, it had said, "for which water has been reserved." The Court confused the concepts. "Reserved" on line 29 goes along with the water reservation process in Montana. The Water Use Act passed by the legislature in 1973, allowed state agencies to reserve water for future public use. That is what that language on the bottom of page 12 has always referred to. It is so much a part of our language, he believed that no one thought it was necessary to explain. **SEN. GROSFIELD** referred to page 19, line 15, where it says, "reallocation of reserved water... may be made by the Department," and felt the court interpreted that language

as giving the Department the authority to reallocate federal reserve water rights. He stated that the Dept. has no authority, and never would have the authority to reallocate reserved water rights. That would arise out of federal law and may be compacted through the Reserve Water Rights Compact process in a voluntary agreement between a tribe and the State of Montana.
SEN. GROSFIELD finished by emphasizing that the bill arose from a request by the Department out of concern directly from the Governor, and this bill needs to be passed. He reiterated that this bill does not affect the federal or the tribal reserve water rights. He added that if anything, it helps them because the language added, (page 8, lines 20 & 21,) where it says, "The term includes federal non-Indian and Indian reserved water rights created under federal law and water rights created under state law." For the first time, we statutorily recognize that those federal reserve rights are indeed existing rights under Montana law.

{Tape: 1; Side: A; Approx. Time Count: 1:15; Comments: .}

Proponents' Testimony:

Bud Clinch, Director of DNRC, passed out his written testimony that went through the bill section by section, **(EXHIBIT 1)**. As **SENATOR GROSFIELD** has stated, he has introduced this legislation on behalf of the Department and this bill was a response to Montana Supreme Court's majority decision in the case commonly referred to as the Pope Case. Since the time the Montana Supreme Court issued its opinion at the end of August 1996, the Department of Natural Resources has been working diligently to put together a bill that reflects sound water policy that strikes a balance between protection of existing rights including federal, Indian and non-Indian reserve water rights and the right to acquire new rights and change existing rights. He stated that this comprehensive legislation strikes that balance when it's considered in its totality with the other water resource tools contained in the Water Use Act, such as the administrative and legislative basin closures, the state water reservation provisions, and the water leasing provisions. This legislation restores Montana to the position the legislature and executive branch was in before the Supreme Court decision and the Dept. strongly urged the Committee's support.

Holly Franz, Montana Power Co, stated she was a proponent to this bill because she agreed that there needs to be a legislative response to the Pope decision. She explained that decision affected two processes, the permitting process and the change process. She clarified that a permit process is to a new water use, and a change process is to an existing water use. For a permit you have to prove than there was unappropriated water available and there would be no adverse impacts to senior water rights. In a change, the person already has a senior water, or an existing water right, they just want to do something different with it, such as changing the point of diversion, but it's

usually something fairly simple. She said changes are different that permits in that there's already water rights for those individuals and one is not putting a brand new use on the stream, but again, adverse impacts on senior water rights have to be looked at. What the Pope Decision did was they said that you cannot determine, until the adjudication is complete, whether there is any adverse impact on senior water right holders, therefore, so we can have no changes and no permits.
Ms Franz did not have any problems with the bill concerning existing water rights, but she was concerned when it addressed the permitting criteria, ie., (311 criteria), which is the criteria you have to prove before a permit is issued. She was concerned that the language in the bill possibly was not going back to status quo regarding permitting. The Water Use Act tries to balance between the new development and the senior water rights. She said as she read this bill, it appeared to her that we are making a switch quite a ways towards the development side. **Ms. Franz** apologized for not having amendments for the bill but she believed that some changes should be looked at quite closely. The test in the past was always, "is there unappropriated water available." She retorted that just because there's water in a stream doesn't mean it's unappropriated. She referred to Page 12, lines 13-18, where a lot of things were crossed out about what has to be proved to get a permit for unappropriated water. The bill puts in the test, "water physically available," but when one goes down to B, it says, rather than having to prove unappropriated water, it's whether water reasonably can be considered "legally available." She was unclear if that meant unappropriated water. On line 23, they have to show that an applicant's plan for the permit demonstrates that the use of the water will be controlled so that the water right of a prior appropriator will be satisfied. Again, she said it was unclear what that meant, along with "legally available."

Ms. Franz wanted to comment on the deletions on lines 28 & 29. She did not know why that reference to interference with a permit was deleted. Regarding "for which water has been reserved," she understood why that was taken out, but suggested to just specify that it was a water reservation. She commented on page 13, line 17, that refers to big appropriations, and said that there were not any consideration concerning the impact on senior water rights. Overall, she did think **SEN. GROSFIELD** was right when he said we need to pass this bill. "We need to address the court decision but we have to make sure we don't throw the baby out with the bath water when we're doing it."

Mike Murphy, Montana Water Resources Association, wished to go on record in support of HB97, but the association did have some reservations. **Ms. Franz** identified some of those reservations in regards to the specifics of Section 311. He had some concerns also regarding the definitions of "physically available" and "legally available." Thirdly he had some question about the timing of the moratorium being proposed in regards to the reservations. He said that would extend a moratorium to the year

2003, and a bill was just heard extending the Compact Commission efforts to the year 2005. He suggested that the time frame be shortened to 1999 or 2001 because he felt that should be enough time to look at an additional extension of that moratorium or take some other action. He felt that the provision that allowed ground water to continue to be permitted was appropriate, along with the exclusion of the change of use within this moratorium.

John Bloomquist, Montana Stockgrowers Association, believed this bill needed to be passed to address the ramifications of the Pope Decision. He believed recognition of post July 1, 1973 permits and changes is necessary and that this bill reaffirms those particular actions by DNRC. He thought the Pope Decision was erroneous as **SEN. GROSFIELD** pointed out, primarily for misreading of the words "reserved water" which he pointed out, and thought that the definition change for state water reservations is a good idea. He then talked about the state's rights and sovereignty regarding water resources. He thought the language on page 3 where the bill talks about the moratorium is not waiving the state's jurisdiction. He said this legislation is changing the criteria for new permits, and also did not know what "legal availability" meant. He thought it was unappropriated water, possibly water that would be available at the time when the applicant is proposing to use it, but felt that point should be made clear. The moratorium itself, raised a question primarily of what happens in the interim, he stressed. On Indian reservations, whether it's the Flathead or other ones now, do we go into a period of limbo for development of the water resource? He thought it appeared that way to him, so the question was if development was going to occur, who's going to allow it and what is the mechanism in this moratorium? Or do we just shut it off? He thought those questions needed to be discussed. He also did not understand the permits over 4,000 or more acre feet, why the adverse affect language was stricken. He said that might need some discussion as well. Again, He thought this bill needed to be passed, but a few questions needed to be answered regarding specifics. He added that maybe a coordination instruction is needed in Section 3 because Senate Bill 59., which extends the compact deadline.

Jan Rehberg, Crowley Law Firm, stated she engaged in water law, but she was not here in behalf of any particular client, although she had a number of clients whose interests would be affected by the provisions in this bill. She reiterated what the prior proponents have stated, that there was a reason to have legislation of this sort adopted. She did have a question as to why they have defined state reserve water rights and have not defined federal reserve water rights. She said it may help make the situation a little clearer if we actually had a definition of federal reserve water rights. **Ms. Rehberg** also brought up the moratorium and the fact that the compacting process has been extended time and time again, and questioned if there would be extensions on the moratorium. She concurred with the concern about the language which dealt with adverse affects, and about

defining adverse affects in a statute. She said that the concept of adverse affect to a prior appropriator has been developed over the course of the last 100 years through decisional law in the courts of this state. She believed every time you try to put that into statutory language, you lose something, and there may be other aspects of adverse affect that should be considered. She also stated that she did not know what "legally available" meant.

Ms. Rehberg referred to Page 15, which dealt with permitting, and said we get back to the concept of reasonable determination of legal availability, which she also thought was ambiguous. She felt that needed to be cleared up. The other concern she had was on changes in the appropriation rights, which she felt were significant, and therefore, more in-depth inquiries needed to be done. She did not suggest they were improper, but had some concerns.

Ms. Rehberg handed out her suggested amendments to SB97, attached as **(EXHIBIT 2)**. She then gave a brief history of her suggestions concerning the Water Use Act to deal with the late claim issue. The Supreme Court issued a decision that said that if claims were not filed under the statutory deadline they were forfeited. She felt that the Supreme Court decision was also wrong and that it did not reflect Constitutional guarantees provided to the holders of existing water rights. She had suggested additional changes which were not passed in 1993 or 1995. She wanted to use this bill because she thought some important things were highlighted that were relevant to her late claim issue.

Jon Metropolis, Flathead Joint Board of Control, stated that this board was an umbrella organization for three irrigation districts on the Flathead reservation, which is composed of about 2,000 farmers and ranchers. They are in support of this bill because something needs to be done about the Pope Decision. He wanted to briefly state that in Section 101, subsection 6, page 3, line 14, where the legislation asserts that this bill does not limit, alter, or wave the state's jurisdiction, was very important to his organization, especially non-members living on the reservation. He gave a brief overview of the demographies. He said 50% of the land area on the reservation is owned by non-tribal members. The population of non-members is somewhere between 80% and 85%, meaning 15% to 20% are members of the tribe. Therefore, non-members having no rights to participate in tribal government, rely on the state government to control, regulate and represent them. It's very important to many residents on the Flathead reservation and other reservations in the state, that if the Legislature is going to place a moratorium on this. He said the Legislature needs to assure them that the state is not pulling out from these reservations altogether. He thought four years until 2001 is long enough. He said he agreed with ground being excluded from the scope of this moratorium should remain excluded, along with changes of use. He said the major concern of his clients is the unknown when the moratorium is put in place. There is regulatory vacuum that would arise. In the case

of the Flathead reservation, the population is growing very quickly and they need to be able to use water. They were concerned over the ability to acquire new use permits, and suggested a mechanism to issue interim permits in such a way that the rights of the non-members there are preserved as well as the rights of the tribes to have their reserve water rights fully adjudicated prior to having other permits issued.

{Tape: 1; Side: B; Approx. Time Count: 1:50; Comments: None.}

Don McIntyre, Legal Council, DNRC, said he was one of the attorneys involved in this litigation. He distributed five handouts: **(EXHIBIT 3)**, the Montana Adjudication Program Expenditures Since 1974; **(EXHIBIT 4)**, Post June 1973 Water Rights on Indian Reservation; **(EXHIBIT 5)**, the definition of Legal Availability; **(EXHIBIT 6)**, a map of Montana General Adjudication; and **(EXHIBIT 7)**, a letter from the Dept. of Interior. He said he would try to clear up some of the questions that have been raised. This case rose as one of jurisdiction. Does the State of Montana have the authority to issue water rights permits changes within the exterior boundaries of the Flathead reservation. He explained when the Supreme Court of Montana decided it, they did not decide it on a jurisdictional issue. What the Supreme Court did was issue a decision that was limited to the exterior boundaries of Flathead Indian Reservation. The problem with it, as Chief Justice Turnage pointed out, there's nothing to prevent the logic of this case from extending beyond the boundaries of this particular reservation to the other reservations, whether it be Indian or non-Indian federal right. A number of years before, there was another case known as the Don Brown case, which involved state based rights and the rights of the federal government that were state-based at Canyon Ferry, as well as Montana Power Co. In a nutshell, basically what Judge Bennett said in that particular case, was that the department shouldn't be issuing permits to Don Brown and others out there because until the adjudication was complete, they couldn't prove their case. The case was not appealed with the Montana Supreme Court but an agreement was made with the federal government and Montana Power Co. as to how water right management would take place throughout the years.

Essentially, his opinion of what the court would be saying was- if we don't go back and make the changes, specifically now to 311, that we can't go to court, we're done. He said most likely, we would be going back to court, especially with groundwater issues, and they might fault to Justice Nelson's concurrent opinion.

Mr. McIntyre said the reason they have not defined federal reserved right is that the State of Montana can't define the scope of federal reserve rights because the federal courts are the ones that do that.

He said there were some concerns about 311 criteria and the moratorium. He said the moratorium within the bill is strictly on surface water and strictly on permitting, not changes. He said as we tried to point out in our re-hearing, regarding

changes, it was possible for someone who has an existing right to show that it will not affect even a reserve right even if it is not quantified. They left ground water out because the Dept. felt that ground water is not necessarily subject to reserve water rights. So can developments still take place in the reservation even though there is a moratorium? The answer is yes. It can take place in terms of changes, and sales of water and changes of ground water usage. As to surface water, it would not.

He said one of the benefits of the moratorium, is that it encourages the Tribes to negotiate towards settlements of their water rights. In terms of the time frames points that were made, he agreed with **Mr. Metropoulos** that the sentence in paragraph 6.3 is very important to them because people have to know that this is not jurisdictional. He stated we are not diminishing the jurisdictional rights of the State of Montana nor do we intend to expand them.

Regarding the moratorium as a practical matter, he distributed a handout on post June 1973 water rights on Indian reservation, which was a quick breakdown with respect to surface water and ground water, **(EXHIBIT 3)**. In terms of this bill it's practical affect is on three reservations, the Flathead, the Blackfeet and the Crow. Ft. Peck and the Northern Cheyenne have compacts signed so this moratorium wouldn't apply. When we have compacts on these others, they shouldn't apply. He said the Flathead Reservation was clearly the most active, with 287 surface water and 82 ground water permits since 1973. The Blackfeet had 48 issued, and the Crow had 93 permits issued since 1973.

He went over Section 311. **Mr. McIntyre** pointed out that prior to 1973 you could get a water right virtually any way you wanted and just went the courthouse and filed it. The most predominate of all mechanisms for getting a water right was a use right and if the water was there you took it and then you were put on the ladder of priorities. But one had to honor the call of people higher up the ladder. In 1973, the Water Use Act was adopted and there was a new permitting process established to put some parameters on before a right was given. As a result, the term of adverse affect was brought into permitting. He explained that the term came from the water law in Montana dealing with people who change their water rights and who already have an existing right. The law was you had an absolute right to change your water right, but could not adversely affect any other prior or junior water user.

Adverse affects were always tested in the court, and the person who was affected had to bring it to court and had the burden of proving the situation. He said that was where the term started to come into the statute, and how the statute reads it like a negative, "Do I have to prove lack of adverse affect." How does a new person respond trying to prove that. Over the years, the department has tried to develop tests that would allow a water development to go on and to use this adverse affect test and to use the concept of unappropriated water along with it. We have now developed guidelines under the law as it's now written that

basically incorporate exactly how we're asking the statute to change.
The criteria in subsection 1 has always included this term adverse affect. Once you proved A, you were actually proving B as well. He said they left the term adverse affect in the bill because it is in the statute and decided to define it for purposes of permitting only, not for the changes. There in no change in the language to the change process other than to clarify the rights that can be affected. He said there is an adverse affect test, but the adverse affect test has to be taken in the context of how a person gets a water right.
How do they get it? Physical availability and legal availability of water. Physical availability goes back to the historical notion that the water there, or flowing by. Legal availability does not have a definition, but he said he can provide the Committee with the document or guideline used by the Dept.'s field office which is looked at to assess unappropriated water and adverse affect. He said in implementing this language it will then say that an applicant can prove this criteria before the adjudication is complete. Once the adjudication is complete, you then go back to 311, which basically says we can then use all of the information from the adjudication and either revoke, modify, affirm, or reduce those particular permits. He said they were trying to come up with a comprehensive piece of legislation that allows development, and protects existing water rights and takes us out of the state law question that was before the Supreme Court and will leave it purely jurisdictional.

John Youngberg, Montana Farm Bureau, stated that the water community of the Montana Farm Bureau supported this bill, and felt it was important to pass this piece of legislation. However, they were somewhat embarrassed about not understanding several sections of it. He said the bill is here because of the misunderstanding of the statutes in the courts, therefore felt it was important to have the terms in Section 311 statutorily defined so they will not continue to be subject to the interpretation of the Supreme Court.

{Tape: 1; Side: B; Approx. Time Count: 2:10; Comments: None.}

Questions From Committee Members and Responses:

SEN. MIKE TAYLOR made a comment it was important to get the language correct the first time. He recommended a subcommittee to make sure that this language is correct. He stated he supported the bill but did not want to support something that doesn't explain the rules correctly.

SEN. THOMAS KEATING asked **Mr. McIntyre** if this bill is needed to overcome the improper decision of the Supreme Court and this is at the request of the department, is every change in here related to that decision that needs to be changed?

Mr. McIntyre said when this bill was originally started through the process it was at the request of the Governor. At that time, he specifically directed that no change take place in this bill that was not somehow directly related to the issues that were presented in this case. He said that was why he referred to the Don Brown case because that was the incurring opinion. That point was brought to his attention and he said to go forward with this.

SENATOR KEATING asked everything in this bill deals directly with that decision? **Mr. McIntyre** answered yes. **SEN. KEATING** asked to explain the terms Federal non-Indian and Indian, does this mean Federal non-Indian and Federal Indian. **Mr. McIntyre** said basically Federal Reserve Rights are broken into two categories; Indian and then Non-Indian, meaning all those others.

SEN. KEATING said when we talk about federal water rights and Indian water rights, are the Indian water rights Federal Indian water rights or are they just plain Indian water rights?

Mr. McIntyre answered it depends on whether you're talking about aboriginal Indian rights, then that would be a different category because they are not created by the reservation.

SEN. DALE MAHLUM asked **Mr. McIntyre** if this bill was to pass along with the proposed amendments to it, if someone wanted to bring it to the Supreme Court again, could they throw it out like they did the last one?

Mr. McIntyre said the intent of this bill is to put state law in the position that they cannot issue the same decision they did before, and the anticipation is that it is going back up to the Supreme Court, most likely with respect to ground water, initially.

SEN. FRED VAN VALKENBURG asked **Mr. McIntyre** if the Dept. had a position on **Ms. Rehberg's** proposal to open this up to late claims.
Mr. McIntyre said we only directed to deal strictly with that case.

SEN. VAN VALKENBURG asked **Director Clinch, DNRC,** if he had any comment on the department's position on whether we should be providing an opportunity for people who file late claims to now have those adjudicated by the water court.

Director Clinch said the proposal of the amendments came as a surprise to me but he thought bringing that issue of late claims would bring a whole other layer of players to this bill, often pitting proponents against opponents in a most complex way, which may ultimately result in a tabling of the bill. They would oppose that.

SEN. VAL VALKENBURG asked **Mr. McIntyre** about the issue raised regarding the changes with the very large water users, those with more than 4,000 acre feet per year. He said he understood that one of the changes here is the burden of proof under 311-1, the preponderance of the evidence, where the burden of proof in 311-3 is by clear and convincing evidence. Are we changing the burden of proof on that.

Mr. McIntyre said he thought he might be misunderstanding this. Subsection 3 requires a B, by clear & convincing evidence. All it means is that you go back and look at the criteria in subsection 1, but you apply the standard of review which is clear and convincing when you're looking at the larger water. He said he did not think that anything in this bill changes how the standard of proof is being looked at.

SEN. VAN VALKENBURG asked **Mr. McIntyre** to comment on the objection that some of the proponents had to having the moratorium extend as far as the 2003 as opposed to 2001?

Mr. McIntyre said originally how long the moratorium should go was just tied to the compacting itself. In the last meeting, the issue then came up of wanting a shorter time period. He said it was decided it should be shorter, but we didn't reach any conclusion. The agency thought four years might be too short a period of time to allow those negotiations to go forward. He said they didn't want to use an even number year because the Legislature wasn't meeting, therefore the year 2003 was adopted by the agency.

SEN. VAN VALKENBURG asked **Mr. McIntyre** if the Confederated Salish & Kootenai Reservation were a party to this Pope Case and were they the prevailing party? **Mr. McIntyre:** Yes.

SEN. VAN VALKENBURG asked why they were not here today.

Mr. McIntyre said when the communication was directed to the tribes
concerning this bill, the Flathead did not respond.
He said he did not know what their input would be on this bill but he suspected they would oppose it simply because right now, if the law were to stand, the State of Montana would not be doing any permitting or changing within their boundaries.

SENATOR MACK COLE asked **Director Bud Clinch** if the negotiations were going to continue.

Director Clinch said absolutely not. Negotiations will continue, and we have not interrupted any negotiations as a result of this.

SEN. COLE asked **Director Clinch** if we going to allow the permitees to become part of the negotiations as far as the water right is concerned?

Director Clinch answered that holders of state rights can now take a more active role in the negotiations.

SEN. VAN VALKENBURG asked **Director Clinch** to clarify that these are all state water right permits and these have nothing to do with tribal water rights. **Bud Clinch** said he believed that was correct.

SEN. VAN VALKENBURG asked **Mr. McIntyre** about Indian reserved water rights, and if they all came out of the same decision as far as reserved water rights are concerned?

Mr. McIntyre said the issue of Federal Reserved Water Rights initially came out of a case called the "Winters Case." This was in Montana where Federal Reserved Rights or Indian Reserved Rights were first recognized. It was thought of as a special rule of Indian law for almost 50 years. Then subsequent cases applied the Federal Reserved Doctrine to not only tribes but to the federal government as well.
Mr. McIntyre said the only distinction between the Federal Reserve Water Rights, Indian/non-Indian is that Indian are as a result of the trust responsibility in the United States whereas other Federal Reserved Rights are simply within the United States Government.

SENATOR VIVIAN BROOKE asked **Mr. McIntyre** about the definition that he passed out, **(EXHIBIT 5)**, on legal availability. She thought water would be over appropriated by using this definition.

Mr. McIntyre explained that there are two tests, physical availability and legal availability. Physical availability actual water existing in the stream and is flowing by. He said legal availability makes you go farther to see whether there is any left to claim by checking all available records. If there's more water physically available as a result of your measurement than there are claims, then water is legally available. This gives the applicant the ability to come in and show his case and prove under legal available.

{Tape: 2; Side: A; Approx. Time Count: 2:25; Comments: Start of Tape 2.}

SEN. BROOKE said the letter from the Dept. of Interior argues from the federal point of view, and asked if there were other letters that came in?
Mr. McIntyre said he had not read that letter and he just saw a copy as well. The Federal Government was asked to comment as well as the Indian Tribes and most of the correspondence that the Governor had received and passed on to us was that they were still looking at the bill. His assumption was that this was sent in contemplation of the hearing.

SEN. BROOKE: When you sent out for opinions, what other responses did you get. **Mr. McIntyre** replied that he thought they only received one response from the Blackfeet and the Crow sent in letters that were not supportive. He said most of the comments they received came from water attorneys and users of water such as those who have appeared today.

SEN. BROOKE asked **Mr. McIntyre** about the positive language rather than the negative language regarding Section 311.

Mr. McIntyre said going back to what he said in terms of what is it when you get a permit- you get the right to come onto the stream with your priority date. Your priority date is junior to all water rights before, whether they are existing water rights, reserved water rights, or any other. This language is really redundant language and in their opinion was not needed anymore.

SEN. BROOKE asked **Holly Franz** if that satisfied her concern.

Ms. Franz said that probably stated pretty clearly what my concern was. She summarized what **Mr. McIntyre** had said. These amendments take us back somewhat to where we were before 1973, in that you just go out, you get a water right, and then it's the duty of a senior water user to enforce their priority against that new water right. In the Water Use Act of 1973 we set up a system so the individual would have to come into the department and prove that water was not adverse affect before they were given the water right. She stated the theory as, our whole water right system works on priorities. She said it was a good theory but we really have a fairly ineffective method of enforcement, until the adjudication is complete. She felt that the burden was being shifted to the senior user.

{Tape: 2; Side: A; Approx. Time Count: 2:35; Comments: None.}

<u>Closing by Sponsor:</u> **SEN. GROSFIELD** wanted to thank everyone, and said it was a great education on our water rights process. He made a few closing point, one being that words can be very important in legislation. This whole problem came about because of a misunderstanding by the court of a word, the word "reserved." If it rather said, for which water has been reserved under state law, the court would never have come to that conclusion. He said this was a classic example of how important little words here and there are and why it's so important for us all to pay close attention when we're drafting legislation that's going to be reviewed by people, maybe in distant years, distant towns or in the Supreme Court.

SEN. GROSFIELD said there were some concern about the moratorium, if we have to do that and how long do we have. Presently, the law is the Pope Decision, which puts a permanent status on the moratorium. He added that could be an oxymoron because a

moratorium means there's always an end to it. The Pope Decision is permanent. He said he was uncomfortable having a moratorium extend until compacting is done because it might take a long time, but he did not want to leave it open-ended either, so that was why 2003 was chosen. He said one of the advantages to a moratorium is that it does give the tribe some impetus to negotiate, since the time frame of the compact is limited. He said to remember that the Pope Decision is in place, and as **SEN. VAN VALKENBURG** pointed out, the tribes prevailed in that case.

He pointed out on page 3, the declaration of policy and purpose section, sub 5. He said he was pleased with that new language in sub 5, because it describes the history of water right law in this state and it serves to clarify water claims that end up in misunderstanding. He said it was very important language and very important concepts to have in our policy section of our water permitting statute.

He said groundwater is not in this bill, and agreed it is important to keep that out. The question of shifting the burden to senior users, he did not totally agree. He said in our water law, a senior water right is a great thing to have but with that comes a little bit of responsibility to protect that. In that sentence he was not sure if it shifted the burden to the senior water right holders, so it was something that needed to be discussed further. **SENATOR GROSFIELD** said this bill needs to pass, it is just a matter of putting it into a final form.

VICE CHAIRMAN CRISMORE closed the hearing on SB 97 and adjourned.

ADJOURNMENT

Adjournment: 2:45 PM

WILLIAM CRISMORE, Vice Chairman

GAYLE HAYLEY, Secretary
by Shirley Herrin

LG/GH

MINUTES

MONTANA SENATE
55th LEGISLATURE - REGULAR SESSION

COMMITTEE ON NATURAL RESOURCES

Call to Order: By **CHAIRMAN LORENTS GROSFIELD**, on January 27, 1997, at 1:00 P.M., in Room 405.

ROLL CALL

Members Present:
Sen. Lorents Grosfield, Chairman (R)
Sen. William S. Crismore, Vice Chairman (R)
Sen. Vivian M. Brooke (D)
Sen. Mack Cole (R)
Sen. Thomas F. Keating (R)
Sen. Dale Mahlum (R)
Sen. Bea McCarthy (D)
Sen. Ken Miller (R)
Sen. Mike Taylor (R)
Sen. Fred R. Van Valkenburg (D)

Members Excused: None

Members Absent: None

Staff Present: Larry Mitchell, Legislative Services Division
Gayle Hayley, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:
Hearing & Date Posted: None
Executive Action: SB 97, SB 108, HB 118

CHAIRMAN LORENTS GROSFIELD relinquished the chair to VICE CHAIRMAN WILLIAM CRISMORE because he was unable to be there to open the Committee meeting.

EXECUTIVE ACTION ON SB 97

Motion/Vote: **SEN. MACK COLE MOVED TO RECONSIDER AMENDMENT sb09701.alm BY SEN. GROSFIELD. Motion CARRIED 9-1.**

SEN. MACK COLE referred to Page 2, New Section 19, Part 2, and said he wanted to delete that portion because it had a part which could end up being controversial if passed, especially in 2(a), providing for exclusive authority by the state to issue permits, etc. He explained if there was a situation where there was an agreement, it could have items on how the administration would

be done, sometimes jointly; however, it would always be done through total agreement, and leaving this amendment in there could limit or at least hinder some of the people in being able to negotiate.

Motion: **SEN. MACK COLE MOVED TO DELETE SECTION 19(2) OF THE AMENDMENT.**

Discussion: **SEN. GROSFIELD** commented he would resist that amendment because the attempt was to give the ability to set up some kind of interim process, and if that amendment was deleted, many area water users would be pretty nervous. He explained deleting it could be perceived as giving the Department the authority to not retain exclusive authority; it was addressed on Page 3, Lines 14-16. That should be some comfort level to those people, but 2(a) reinforced it; he was uncomfortable about giving it up, especially since the amendment was already adopted.

SEN. VIVIAN BROOKE asked if **SEN. COLE'S** argument was during negotiations it wouldn't be applicable. **SEN. COLE** said he didn't say it might not be applicable; rather, negotiations would be limited with 2(a). He stated he would amend his amendment just to be 2(a); he didn't see any big problems with 2(b) and 2(c). He explained when negotiations were in process and both sides took a look, there could be some people who wondered why negotiations were going on if it was apparent how the administration was going to be issuing permits when it was already written in the law. He suggested it would hurt negotiations.

SEN. BROOKE asked for **Susan Cottingham's** comment on the amendment and was told it would actually be the DNRC doing the negotiating so she would defer to them.

Don McIntyre said they originally had what was now the first and third part, and initially the only reservation he had was the issue of whether or not the tribes would see it as inflammatory; however, he thought the state would seek retention in any negotiation so the Department had no objection. **Mr. McIntyre** said it was as **SEN. COLE** presented it -- something the agency would strive for in terms of its negotiations.

Vote: **Motion TO DELETE SECTION 19(2) OF THE AMENDMENT FAILED 5-5 WITH SEN. TOM KEATING, SEN. KEN MILLER, SEN. MIKE TAYLOR, SEN. WILLIAM CRISMORE AND SEN. LORENTS GROSFIELD VOTING NO.**

Motion/Vote: **SEN. LORENTS GROSFIELD MOVED DO PASS ON SB 97 AS AMENDED. Motion CARRIED UNANIMOUSLY 10-0.**

VICE CHAIRMAN WILLIAM CRISMORE relinquished the chair to CHAIRMAN LORENTS GROSFIELD.

MINUTES

MONTANA HOUSE OF REPRESENTATIVES
55th LEGISLATURE - REGULAR SESSION

COMMITTEE ON NATURAL RESOURCES

Call to Order: By Chairman Dick Knox, on March 5, 1997, at 3:15 p.m., in Room 437

ROLL CALL

Members Present:

Rep. Dick Knox, Chairman (R)
Rep. Bill Tash, Vice Chairman (Majority) (R)
Rep. Hal Harper, Vice Chairman (Minority) (D)
Rep. Haley Beaudry (R)
Rep. Aubyn A. Curtiss (R)
Rep. Jon Ellingson (D)
Rep. Doug Mood (R)
Rep. Karl Ohs (R)
Rep. Scott J. Orr (R)
Rep. Bob Raney
Rep. Trudi Schmidt (D)
Rep. Robert R. Story, Jr. (R)
Rep. Jay Stovall (R)
Rep. Emily Swanson (D)
Rep. Lila V. Taylor (R)
Rep. Cliff Trexler (R)
Rep. Carley Tuss (D)
Rep. Douglas T. Wagner (R)

Members Excused: Rep. Tuss

Members Absent: none

Staff Present: Kathleen Williams, Legislative Services
Stephanie Braun, Committee Secretary

Committee Business Summary:
Hearing(s) & Date(s) Posted: SB 97 (2/21), SB 108 (2/21)
Executive Action: none

HEARING ON SB 108

Opening Statement by Sponsor: Sen. Tom Beck, SD #28
{Tape: 1; Side: a; Approx. Time Count: 1.3; Comments: none.}

Proponents' Testimony:
John Bloomquist, attorney from Helena, submitted **Exhibit #1**
{Tape: 1; Side: a; Approx. Time Count: 3.0; Comments: Exhibit #1.}

Mike Murphy, MT Water Resources Association
{Tape: 1; Side: a; Approx. Time Count: 17.3; Comments: none.}

John Youngberg, MT Farm Bureau
{Tape: 1; Side: a; Approx. Time Count: 18.2; Comments: none.}

Susan Cottingham, MT Water Reserved Water Rights Compact Commission
{Tape: 1; Side: a; Approx. Time Count: 19.1; Comments: none.}

Holly Franz, MT Power Company
{Tape: 1; Side: a; Approx. Time Count: 21.1; Comments: none.}

Harley Harris, Assistant Attorney General
{Tape: 1; Side: a; Approx. Time Count: 21.1; Comments: none.}

Don MacIntyre, attorney for Department of Natural Resources and Conservation submitted **Exhibit 2**
{Tape: 1; Side: a; Approx. Time Count: 22.4; Comments: Exhibit #2.}

Jan Rehberg, attorney, representing herself submitted **Exhibit #3**
{Tape: 1; Side: a; Approx. Time Count: 23.1; Comments: Exhibit #3.}

Opponents' Testimony: none

Informational Testimony:
Bruce Loble, Judge MT Water Court
{Tape: 1; Side: a; Approx. Time Count: 27.9; Comments: none.}

Questions From Committee Members and Responses:
{Tape: 1; Side: a; Approx. Time Count: 28.1; Comments: none.}

Closing by Sponsor:
Sen. Beck closed
{Tape: 1; Side: b; Approx. Time Count: 4.9; Comments: none.}

HEARING ON HB 97

Opening Statement by Sponsor:
Sen. Lorents Grosfield, SD #13
{Tape: 1; Side: b; Approx. Time Count: 5.7; Comments: none.}

Proponents' Testimony:
Don MacIntyre, Department of Natural Resources and Conservation submitted **Exhibit #4**

{Tape: 1; Side: b; Approx. Time Count: 12.7; Comments: Exhibit #4.}

Jon Metropoulos, FJBC, represents three water Districts submitted **Exhibit #5**
{Tape: 1; Side: b; Approx. Time Count: 30.1; Comments: Exhibit #5.}

Holly Franz, MT Power Company submitted **Exhibit #6**
{Tape: 1; Side: b; Approx. Time Count: 39.6; Comments: Exhibit #6.}

{Tape: 1; Side: b; Approx. Time Count: end; Comments: flipped tape at very end.}

{Tape: 2; Side: a; Approx. Time Count: 0.1; Comments: none.}

John Bloomquist, MT Stockgrower's Association
{Tape: 2; Side: a; Approx. Time Count: 4.8; Comments: none.}

Mike Murphy, MT Water Resource Association
{Tape: 2; Side: a; Approx. Time Count: 8.7; Comments: none.}

John Youngberg, MT Farm Bureau
{Tape: 2; Side: a; Approx. Time Count: 10.0; Comments: none.}

Jan Rehberg, attorney, representing herself submitted **Exhibits #7 & #8**
{Tape: 2; Side: a; Approx. Time Count: 11.0; Comments: Exhibit #7 & #8.}

Opponents' Testimony: none

Informational Testimony:
Susan Cottingham, Reserve Water Rights Compact Commission
{Tape: 2; Side: a; Approx. Time Count: 17.5; Comments: none.}

Questions From Committee Members and Responses:
{Tape: 2; Side: a; Approx. Time Count: 18.8; Comments: none.}

{Tape: 2; Side: a; Approx. Time Count: end; Comments: flipped tape at the very end.}

{Tape: 2; Side: b; Approx. Time Count: 0.1; Comments: none.}

{Tape: 2; Side: b; Approx. Time Count: end; Comments: flipped tape at the very end.}

{Tape: 3; Side: a; Approx. Time Count: 0.1; Comments: none.}

Don MacIntyre submitted Exhibit #9

Closing by Sponsor:
Sen. Grosfield closed
{Tape: 3; Side: a; Approx. Time Count: 0.9; Comments: none.}

Rep. Knox assigned a Subcommittee (Chair Rep. Tash, Rep. Ohs, Rep. Story, Rep. Harper and Rep. Schmidt) to study SB 97 and the proposed amendments.
{Tape: 3; Side: a; Approx. Time Count: 1.7; Comments: none.}

MINUTES

MONTANA HOUSE OF REPRESENTATIVES
55th LEGISLATURE - REGULAR SESSION

COMMITTEE ON NATURAL RESOURCES

Call to Order: By Chairman Dick Knox, on March 21, 1997, at 3:00 p.m., in Room 437

ROLL CALL

Members Present:

Rep. Dick Knox, Chairman (R)
Rep. Bill Tash, Vice Chairman (Majority) (R)
Rep. Hal Harper, Vice Chairman (Minority) (D)
Rep. Haley Beaudry (R)
Rep. Aubyn A. Curtiss (R)
Rep. Jon Ellingson (D)
Rep. Doug Mood (R)
Rep. Karl Ohs (R)
Rep. Bob Raney
Rep. Trudi Schmidt (D)
Rep. Robert R. Story, Jr. (R)
Rep. Jay Stovall (R)
Rep. Emily Swanson (D)
Rep. Lila V. Taylor (R)
Rep. Cliff Trexler (R)
Rep. Carley Tuss (D)
Rep. Douglas T. Wagner (R)

Members Excused: Scott Orr

Members Absent: none

Staff Present: Kathleen Williams, Legislative Services
Stephanie Braun, Committee Secretary

Committee Business Summary:

Hearing(s) & Date(s) Posted:	HB 607 (3/14), SB 273 (3/7), SB 315 (3/7)
Executive Action:	SB 97 (15-3) DO CONCUR, SB 224 (12-6) DO CONCUR, SJ 13 TABLED (10-8)

HEARING ON HB 607

Opening Statement by Sponsor: Rep. Larry Grinde, HD 94 submitted **Exhibit #1**
{Tape: 1; Side: a; Approx. Time Count: 1.3; Comments: Exhibit 1.}

Questions From Committee Members and Responses:
{Tape: 2; Side: a; Approx. Time Count: 32.0; Comments: none.}
{Tape: 2; Side: a; Approx. Time Count: end; Comments: flipped tape at the end.}

{Tape: 2; Side: b; Approx. Time Count: 0.1; Comments: none.}

Closing by Sponsor: Sen. Bea McCarthy closed
{Tape: 2; Side: b; Approx. Time Count: 16.0; Comments: none.}

HEARING ON SB 273

Opening Statement by Sponsor: Sen. Linda Nelson, SD 49
{Tape: 2; Side: b; Approx. Time Count: 16.8; Comments: none.}

Proponents' Testimony:
Mike Volesky, Executive Director Conservation Districts
{Tape: 2; Side: b; Approx. Time Count: 19.7; Comments: none.}

Mike Murphy, MWRA
{Tape: 2; Side: b; Approx. Time Count: 20.8; Comments: none.}

John Tubbs, Department of Natural Resources and Conservation
{Tape: 2; Side: b; Approx. Time Count: 21.4; Comments: none.}

Exhibit #3 (written only) Anne Debevoise Ostby, Dagmar, MT self

Exhibit #4 (written only) Tim Holte, self lives in Sheridan County

Opponents' Testimony: none

Questions From Committee Members and Responses: none

Closing by Sponsor: Sen. Nelson closed
{Tape: 2; Side: b; Approx. Time Count: 22.9; Comments: none.}

EXECUTIVE ACTION ON SB 97

Motion: Rep. Story DO CONCUR
{Tape: 2; Side: b; Approx. Time Count: 24.0; Comments: none.}
Rep. Tash comments on the Subcommittee and the amendments that the Subcommittee adopted.

Amendments: sb009701.akw

Rep. Taylor asked Kathleen (staffer) what the relationship between the two amendments (Rep. Tash & Rep. Taylor) was.
{Tape: 3; Side: a; Approx. Time Count: 0.6; Comments: none.}

Rep. Harper commented on his concern with how this bill would effect the Tribes.

{Tape: 3; Side: a; Approx. Time Count: 3.7; Comments: none.}

Discussion ensues between Rep. Harper, Don MacIntyre (DNRC), Rep. Tash and Susan Cottingham about the Tribes and where they could make objections in this process.
{Tape: 3; Side: a; Approx. Time Count: 5.0; Comments: none.}

MOTION: Rep. Tash moved the amendments (sb009701.akw)

Motion/Vote: Question was called for; (18-0), amendment is adopted
AMENDMENTS: Rep. Taylor hands out her amendments; sb009702.akw and moves the amendments
{Tape: 3; Side: a; Approx. Time Count: 14.5; Comments: none.}

Discussion:
{Tape: 3; Side: a; Approx. Time Count: 17.7; Comments: none.}

MOTION/VOTE: Question is called for; individual roll call vote; amendment passes 10-8

Rep. Harper is nervous about Rep Taylor's amendment.
{Tape: 3; Side: b; Approx. Time Count: 1.6; Comments: none.}

VOTE: Question is called for on the Bill with the attached amendments, individual roll call vote; (15-3) DO CONCUR as amended; Reps Raney, Tuss & Schmidt vote no

EXECUTIVE ACTION ON SB 224

Motion: Rep. Beaudry moves DO CONCUR

Discussion: Rep. Harper feels this Bill guts the citing act.
{Tape: 3; Side: b; Approx. Time Count: 6.6; Comments: none.}

Rep. Beaudry, this act is called the major facility citing act, he feels the act as it stood was not adequate.
{Tape: 3; Side: b; Approx. Time Count: 8.9; Comments: none.}

Motion/Vote: Question is called for, individual roll call vote; (12-6), Reps. Harper, Raney, Ellingson, Tuss, Schmidt & Swanson vote no, Bill passes out of Committee

EXECUTIVE ACTION ON SJ 13

Motion: DO CONCUR

Discussion: Rep. Raney doesn't like the tone of this bill. He feels if MT wanted to be a party to the negotiations it should have been part of the lawsuit as an intervener; MT wasn't part of the lawsuit and people who aren't part of lawsuits aren't typically involved in the negotiations only parties involved are.